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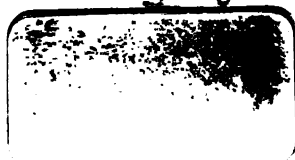
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IRISH COMMON LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

EXCHEQUER,

EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1860 AND 1861.

Queen's Bench;

By WILLIAM M. JOHNSON, Esq. AND THOS. BRUNKER, Esq.

Common Pleas;

By B. L. FLEMING, Esq. AND SAMUEL V. PEET, Esq.

Exchequer;

By SAMUEL WALKER, Esq.

Exchequer Chamber;

By WILLIAM M. JOHNSON, Esq., B. L. FLEMING, Esq.
AND SAMUEL WALKER, Esq.

Court of Criminal Appeal;

By JOHN O'LEARY, Esq.

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MEM.—In the Long Vacation of 1860, Mr. Serjeant FITZGIBBON was appointed Master in Chancery, in the room of A. LYLE, Esq.

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COMMON LAW REPORTS,
OF CASES ARGUED AND DETERMINED IN
THE COURTS OF
QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,
Exchequer Chamber,
AND
COURT OF CRIMINAL APPEAL.

In the matter of
JOHN *alias* JOHN EDWARD MOORE, an Infant.*
(*Queen's Bench*).

E. T. 1859.
Queen's Bench
April 27.
May 11.

APPLICATION for a writ of *habeas corpus*, directed to the Rev. Eugene O'Meara, George Jepps and Mary Sheane, wife of Andrew Sheane, to have the body of the said John *alias* John Edward Moore before the Judges of the Court of Queen's Bench, with the

In the absence of the appointment of a guardian by the father, the mother surviving him is the guardian for

nurture, and entitled to the custody of a legitimate child, until it attain the age of fourteen years.

But the right of the parent or guardian for nurture to the custody of the child may be forfeited by prior immorality; by the want of *bona fides* in the application to the Court for a writ of *habeas corpus* to obtain the custody of the child; by its being shown, to the satisfaction of the Court, that the parent or guardian has an illegal object or purpose in view in obtaining the custody of the child; or that such parent is unfit for discharging the duties of guardian, and that it would not be for the welfare of the child that it should be given into the custody of the parent or guardian—*per* LEEFROY, C. J., and HAYES, J.; but, *per* PERRIN and O'BRIEN, JJ., in order to constitute, in a Court of Law, a forfeiture of the right of the parent or guardian for nurture to the custody of the child, the immorality of such parent or guardian for nurture must be of so gross a character that the morals of the child would be seriously endangered by being allowed to live with such parent or guardian for nurture; or that such parent or guardian for nurture has been guilty of cruelty and personal ill-usage towards the child.

Wilful and deliberate lying, showing an utter recklessness and disregard for truth, together with fraud practised on a charitable society, in order to obtain the benefits of the institution for the child, is such immorality as will cause a forfeiture of the right of a parent or guardian for nurture to the custody of the child—*per* LEEFROY, C. J., and HAYES, J.—[PERRIN and O'BRIEN, JJ., *dissentientibus*].

* The publication of this case has been unavoidably delayed.
VOL. 11.

1 L

E. T. 1859.
Queen's Bench
In re
 MOORE.

causes of detention. A conditional order to the above effect was obtained on the 29th of January 1858. It appeared by the affidavit of Mary Moore, the mother of the infant, sworn the 28th of January 1858, that her husband, Edward Moore, died in the month of February 1851 (this she corrected in a subsequent affidavit, by stating that her husband died in the month of February 1852, and not in February 1851, and that the burial certificate was in the hands of the solicitors of the Rev. Eugene O'Meara), leaving her and two children, of whom the infant John Edward Moore was one. That the said John Edward Moore was born on the 24th of March 1850, and he was then seven years and ten months old. That another child was born six months after the death of her husband, which had died. That the said Edward Moore did not appoint any testamentary guardian for his children, and that she, as their mother and guardian for nurture, kept them in her own custody, until she parted with the custody of the said John Edward Moore, as therein mentioned. That, about two and a-half years after the death of her husband, she was visited sometimes by members of the Protestant Orphan Society, and, amongst others, by the said Rev. Eugene O'Meara, the visiting secretary of said Society, for the purpose of inducing her to place the said John Edward Moore under the care of said Society. That a memorial * for that purpose was prepared, signed by six subscribers, as required by the rules of the Society.

The poverty or inability of the parent or guardian for nurture to maintain and educate properly the child is no ground for depriving the parent or guardian for nurture of the right to its custody; although (*per* LEFROY, C. J.), under the circumstances of this case, it fortifies strongly the want of *bona fides* in the application.

Guardianship being a personal trust, any assignment or relinquishment, by a guardian for nurture, of the right to the custody of the child (however formally made) is, in a Court of Law, revocable at the will of the guardian, who does not thereby divest himself either of his rights or duties as to the custody of the child.

The distinction between the principles by which Courts of Law and those by which Courts of Equity are guided, with regard to the custody of children, pointed out.

* NOTE.—This document was as follows:—

“ PROTESTANT ORPHAN SOCIETY,

Office, 17 Upper Sackville-street, Dublin,

Founded A. D. 1828.

FORM OF APPLICATION FOR THE ADMISSION OF AN ORPHAN.

I, Mary Moore, being the mother of John Edward Montgomery Moore,

That the child was accordingly admitted, and sent to the county Wicklow to nurse. That, in the years 1854, 1855 and 1856, she saw the child when brought up for inspection. That, in June 1856, being desirous of taking the said John Edward Moore under her own care, she made frequent applications to the committee of the Society, and to the persons having charge of the child, to give him up to her, which applications were refused. That, in 1856, she applied to a Police Magistrate to assist her in getting back the child,

E. T. 1859.
Queen's Bench
In re
MOORE.

who is now residing at No. 13 Temple-court, in the parish of St. George, who was born on the 20th day of March 1849 last, humbly solicit that he may be received under the protection of the Protestant Orphan Society; and I do hereby promise, consent and agree that, if he be elected, he shall be entirely given up to the care and management of the committee of said Society, to be by them disposed of, and, when fit, apprenticed, or otherwise provided for, in such place and manner as the committee may decide. The child's father is dead, was a Protestant, and by occupation a conducting clerk. The mother is alive, and a Protestant, and by occupation a —, * and this orphan has — brothers and one sister, Mary Jane.

Dated this 19th day of May 1852.

MARY MOORE,

Residing at 13 Temple-court.

We, the undersigned subscribers to the Society, recommend the foregoing case of the orphan to the committee.

[Here follow the signatures of six subscribers, and their residences].

No child can be admitted whose age exceeds nine years. Persons signing this certificate are liable to have the child returned to them, if the statement should afterwards be found untrue in any particular.

I do hereby certify that, to the best of my belief, the particulars detailed in the above statement are strictly correct.

Dated the 16th day of May 1852.

To be signed by the Minister or
Curate of the parish in which
the child resides.

DAVID STEWART } Minister or
Curate of
St. George's.

[Here followed a medical certificate as to the health of the child, and directions for the filling up the blanks in the above form].

N. B.—The marriage certificate of the parties, the baptismal certificate of the applicant, and the burial certificate of the deceased parent or parents, must accompany this petition; or, if these cannot be procured, such documentary proofs shall be produced on these subjects as to the committee shall appear satisfactory. If the parent was a subscriber to the funds of the Society, state the name of the collector to whom he paid.

Let this form, with the above certificates, be returned to the office as soon as possible."

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but that he referred her to the Court of Queen's Bench. That a letter was written by a lady, in the mother's name, and by her direction, to the Rev. Eugene O'Meara, requesting the child to be given up to her, but that the committee of the Society refused to do so. That the allegation that she had no means of supporting the child was quite untrue; for that she "will have the means of having her said son sent to school and supported." That her husband was a Protestant, and she herself was a Roman Catholic; and that in her husband's lifetime their children were baptised by a Roman Catholic clergyman; but that, after her husband's death, for the purpose of having the said child admitted into the said Society, she procured her children to be baptised in the Protestant church of St. George. That, to a letter addressed to the secretary of the Protestant Orphan Society by her attorney, demanding that the child should be restored to her care and custody, no answer was returned. That the present application was made in good faith, and for no illegal or improper purpose, and solely because she believed that it would be for the benefit of her said child to be restored to her custody. From the affidavits filed on behalf of the Protestant Orphan Society, it appeared that no solicitation was employed by the said Society with respect to the child, but that he was admitted on the application of the mother herself. That one of her children was baptised in the workhouse of the North Dublin Union as a Protestant, and that, upon entering the workhouse, she represented herself to be a Protestant; and in the admission-book of the workhouse she, said Mary Moore, and her children, were returned as Protestants. That, since the 11th of August 1852, the said John Edward Moore had been instructed in the truths of Christianity as held by Protestants. That, were it not that the said Mary Moore represented, by the said written application, that the father of the infant was a Protestant, and that she herself was also one, the committee of the Society would not have received the said infant. That the Society had expended at least £40 in the maintenance, education and clothing of the said John Edward Moore. That it was believed that the said Mary Moore had no means whatever of supporting or educating the said infant.

T. O'Hagan (with him *J. O'Hagan*) now moved that the conditional order should be made absolute. The question is, whether the rule established in England by *Alicia Race's case*, reported under the name of *Reg. v. Maria Clarke (a)*, is to be followed by the Courts of Law in this country? It is submitted that the following propositions are in accordance with the authorities, and establish the right of the mother, in this case, to have the custody of her child restored to her. First; the father being dead, without having appointed a testamentary or any other guardian of his children, the mother, surviving him, becomes the guardian for nurture of the children. Secondly; having such a right as that, it can only be taken from the mother by a Court of Law, by such a case of gross immorality being established against the mother as would, in fact, make the Court an instrument of contamination in continuing the child in, or restoring it to, her custody; or where the custody of the child is sought for an illegal purpose. Thirdly; the proper course to have the custody of the child restored to the mother is by writ of *habeas corpus*. Fourthly; the mother being thus entitled to the guardianship of her children, she cannot assign to another, or divest herself of the responsibility and duty cast upon her by nature and the law, and, if she do so, she has a perfect right, at any time, to resume that responsibility; and it is the duty of the Court to aid her in so doing. The first proposition is established by the cases of *Ex parte Glover (b)*, *Villareal v. Mellish (c)*, and *Alicia Race's case (d)*. This Court has nothing to do with the question of religion: *Villareal v. Mellish (c)*; *Talbot v. The Earl of Shrewsbury (f)*; and Lord Campbell, in *Alicia Race's case (g)*, says:—"The Courts know of no distinction between different religions, and "will not interfere with the discretion of guardians as to the faith "in which they educate their wards." As to the second proposition; when it is said, on the other side, that the Court has a discretion to do that which may be most for the benefit of the child, it

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(a) 7 El. & Bl. 186; S. C., 3 Jur., N. S. 335; 26 L. J., Q. B., 169.

(b) 4 Dowl. 291.

(c) 2 Swanst. 533, 536.

(d) *Supra*.(e) *Supra*.

(f) 4 My. & Cr. 672.

(g) 7 El. & Bl. 202; S. C., 3 Jur., N. S., 338; 26 L. J., Q. B., 175.

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is true that the Court has, in a certain sense, a discretion; that is, there may be circumstances of such gross immorality on the part of the parent or guardian as to endanger the morals of the child, as in *Rex v. Delaval* (a); but this is a discretion which is very cautiously exercised by Courts of Law; and of this a strong instance are the cases of *The King v. Greenhill* (b), and *In re Hakewill* (c). The principle upon which the Courts act, in such cases, is well stated in 2 *Story, Eq. Jur.*, s. 1341. In some of the cases the Court merely took care that the child was not kept under illegal restraint, and thus let him go where he pleased: *Rex v. Smith* (d); *In re Preston* (e); *Rex v. Clarkson* (f); *Rex v. Johnson* (g); *Ex parte McClellan* (h); *Blisset's case* (i). The case of *Ex parte Skinner* (h) has been doubted in subsequent cases. As to the third proposition; the writ of *habeas corpus* is granted in favour of the liberty of the subject, and when an adult applies for it, upon the Court being satisfied that he is in illegal custody, it will discharge him from it by writ of *habeas corpus*; but in the case of a child under the age of discretion, too young to judge for itself, the presumption of law is, that where the legal custody is, that is the proper custody, and in such cases deliver the child to the parent or guardian: *Rex v. Smith*; Coleridge, J., in *Rex v. Greenhill* (l). The fourth proposition is fully sustained by a case so far back as the *Year Book*, 8 *Edw. 4*, 7 b; *Chamb. Infan.*, p. 63; *Com. Dig.*, tit. *Guardian*, D; *Villareal v. Mellish* (m); *Bedell v. Constable* (n); *Reynolds v. The Lady Tenham* (o), on appeal to the House of Lords, under the name of *Teynham v. Lennard* (p); *Vansittart v. Vansit-*

(a) 3 Burr. 1434; S. C., 1 W. Bl. 413.

(b) 4 Ad. & El. 624.

(c) 12 C. B. 223.

(d) 2 Str. 982.

(e) 5 Dowl. & L. 233; S. C., 11 Jur. 1039; 17 Law J., Q. B., 221.

(f) 1 Str. 444.

(g) 1 Str. 579; S. C., 2 Ld. Ray. 1334; 8 Mod. 214.

(h) 1 Dowl. 81.

(i) Loft. 748.

(k) 9 B. Moo. 278.

(l) 4 Ad. & El. 643.

(m) *Supra*.

(n) Vaugh. 177.

(o) 9 Mod. 40, 42.

(p) 4 Br. P. C. 302.

tart (a), and *In re Browne* (b); *Hope v. Hope* (c). Nay, further, at Common Law, if the ward was taken away from the guardian, he might have maintained trespass for his recovery: *Bac. Ab.*, tit., *Guardian*, F. The misrepresentations made by the mother, in this case, do not amount to such gross immorality as to disentitle her to have the custody of her child; it must be immorality of a darker dye, as improper conduct, adultery, &c. As to the circumstances of the mother, although she has not actually got the means of maintaining and educating this child, yet she swears that, upon the child being restored to her, she will have those means.

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R. R. Warren (with him *J. E. Walsh*), contra.

While it is admitted that the mother, upon the death of the father without appointing a guardian, is guardian for nurture, until the children attain the age of fourteen years, at the same time the guardian's right is one only *prima facie*, and liable to be controlled by the discretion of the Court; and that this is a case in which it will not exercise that discretion, nor give up this child to the mother. Courts of Equity frequently go very far in the exercise of this discretion. The cases of *Rex v. Clarkson* (d), *Rex v. Johnson* (e), *Rex v. Delaval* (f), *Rex v. De Manneville* (g), and *Rex v. Greenhill* (h), show that Courts of Law will, under certain circumstances, exercise the same discretion. In *Alicia Race's case* there are three circumstances pointed out, the existence of which will prevent a Court of Law giving the custody of the child to the mother; first, prior immorality on the part of the mother, by which must be understood an immorality of a much wider range than that assigned to it by the other side. What can more strongly show the low ebb at which this woman's morality is, than her total disregard of truth, displayed so glaringly by the facts of the re-baptism of her children

(a) 2 De G. & J. 249; S. C., 4 Jur., N. S., 519; 27 Law Jour., Chan., 290.

(b) 2 Ir. Chan. Rep. 151.

(c) 22 Beav. 351; on Appeal, 3 Jur., N. S., 454; 26 Law Jour., Chan., 417.

(d) *Supra*.

(e) *Supra*.

(f) *Supra*.

(g) 5 East, 221.

(h) *Supra*.

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into the Protestant Church, her representation, in the memorial to the Protestant Orphan Society, that she was a Protestant, her stating herself to be a Protestant upon entering the poor-house? all of which she admits to be false, and done for the purpose of obtaining admittance for this child into the Protestant Orphan Society. What the Court has to consider, under such circumstances as these, is, whether it is right to entrust the child to such custody, and what will conduce most to its best interests. The second circumstance is, want of *bona fides* in making the application. The fact of the mother admitting that she has no means to support and educate this child, but that she will have the means, shows that the present application does not *bona fide* emanate from herself, but that she is merely the tool of some one else behind the scenes. The third circumstance is, that the object in obtaining the custody of the child is an illegal or an improper one; and here the object is clearly to bring up this child in the exercise of religious principles different from those in which he has been for a length of time instructed. When the other side contend, and truly, that the Court will not recognise the advantage of one religion over another, it must be remembered that, by the law of the land, the child should properly be educated in the religion of the father, and which prevails equally in Courts of Law as in Courts of Equity, although the machinery of the latter is more effective in carrying it out: *In re Hunt* (a); *In re North* (b), and *Alicia Race's case*, when it came before Sir R. T. Kindersley, Vice-Chancellor, in the Court of Chancery. In this case the father was a Protestant; and the child, who is fully ten years old, has, up to this time, been brought up in the religion of his father; and when religious impressions have been made upon the mind of a child, it is a very serious consideration, should those religious impressions be unsettled: *Stourton v. Stourton* (c). Should the Court consider that these positions are not well founded, this, at least, is the very case in which the Court should be apprehensive of the danger of interfering with the child's religious principles; and that the Court will examine the child, and allow him

(a) 2 C. & L. 373.

(b) 11 Jur. 7.

(c) 3 Jur., N. S., 527; S. C., 26 L. J., Chan., 354.

to choose for himself: *In re Lloyd (a)*. A child of tender years may be capable of such discretion as may subject him to punishment for a crime committed by him: 1 *Hale, P. C.*, p. 26.—[LEFROY, C. J. In such cases the maxim is, *malitia supplet ætatem*.]—But there is another ground upon which the Court will refuse this application, viz., that the mother has bound herself by a contract with the Protestant Orphan Society, giving to that Society the sole control over this child, and in that arrangement she has acquiesced for a number of years. *In re Preston (b)*, the acquiescence of the mother was for a much shorter period than in this case, and yet it was held that such acquiescence was an answer to an application for a writ of *habeas corpus*. The passage cited from 8 *Edw. 4*, 7, also mentioned in *Br. Ab.*, tit. *Guarde*, p. 70, and *Com. Dig.*, tit. *Guardian (D)*, to prove the invalidity of this contract, establishes this, that when the child is handed over by the guardian to another, for the purpose of education, he may retake him, but not when he discharges the child out of the house, and he binds himself apprentice, or when he grants him to another that binds himself. In *Alicia Race's case* the child was merely sent to school. This is really a case of apprenticeship; and at Common Law it is not necessary that the apprenticeship instrument should be under seal: *Burn. Just.*, tit. *Apprentice*. The cases of *Vansittart v. Vansittart (c)*, and *Hope v. Hope (d)*, cited by the other side, were cases in which a Court of Equity refused to enforce the specific performance of a contract, which, however, is very different from holding that a contract is void at Law. He also cited *Colston v. Morris (e)*; *Lyon v. Blenkin (f)*, and *Hill v. Gehme (g)*.

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J. O'Hagan, in reply.

There is a material distinction in the mode in which Courts of Law and Equity act in cases such as the present. Courts of Law

(a) 3 Man. & Gr. 547.

(b) *Supra*.

(c) *Supra*.

(d) *Supra*.

(e) Jac. 57, n.

(f) Jac. 245.

(g) 1 Beav. 540.

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are guided by a strict legal right, controllable only by cruelty or gross immorality on the part of the parent or guardian; a Court of Equity judges, upon the whole, what is best for the interest of its own ward: *Sug. Handy Book of Real Property*, p. 83. Cases relating to illegitimate children have no application to the present, the application in which is founded upon a strict legal right, which has no existence in the case of illegitimate children: *Rex v. Hopkins (a)*. In *In re Lloyd (b)*, Coltman, J., asks upon what legal ground Counsel founds the custody of an illegitimate child? The contract of the mother with the Protestant Orphan Society is merely null and void. The guardianship of the child is inalienable, because it is connected with a duty. At Common Law, guardianship in chivalry was alienable: *Harg.* note to *Co. Litt.*, 88 *b*; but it was the only case in which it was so. At p. 197 of 7 *El. & Bl.* several *Oriental* cases, as to which Patteson, J., had given an opinion, are referred to, and bear strongly upon this case. The contract here is not the same as that of apprenticeship; the latter being a bilateral contract, and the master entitled to the earnings of his apprentice: *Harg.* note to *Co. Litt.*, 117 *a*. Here, however, there is no apprenticeship, nor is there anything to show that the Protestant Orphan Society would be entitled to the earnings of this child.

HAYES, J.

This case comes before the Court on a motion to make absolute a conditional order of the 29th of January 1858, by which it was ordered that a *habeas corpus* should issue for the bringing up the body of one John Edward Moore, an infant. The order was granted at the instance of Mary Moore his mother; and her case, as disclosed on the face of the affidavits, is shortly this:—She states, in her first affidavit, that her late husband died in or about February 1851, leaving two children surviving; that Mary Jane the elder was born in March 1846, and John Edward the younger on the 24th of March 1850; and that, within six months after her husband's death, she was confined of a third child, which has since died.

(a) 7 East, 579.

(b) *Supra*.

That the father of these children was a Protestant, but that she is, and has always been, a Roman Catholic; and that, during the father's lifetime, she had them baptised in the Roman Catholic church in Marlborough-street. What was her intention in taking that step? was it to make the children members of the Roman Catholic church? and, before doing so, did she consult her husband, and obtain his assent to the step? If not, her conduct is, in my judgment, wholly inexcusable; and if she had so consulted him, and obtained his assent, the suppression of the fact from her affidavit is wholly unwarrantable. She says that, about two years and a-half after her husband's death, overtures were made to her on the part of the Protestant Orphan Society, to have her son placed under the care of that body; that she consented to do so, had the proper memorial drawn up, and, in order to facilitate matters, and, as it would appear, of her own motion, had both the children re-baptised in St. George's church; and, in December 1853, she brought the child, John Edward Moore, to the rooms of the Society, in whose charge it has ever since continued. That she saw her child in the month of April of the years 1854, 1855 and 1856, and that, in June 1856, and frequently since, she endeavoured, without effect, to recover possession of her child; and at last, in January 1858, a letter was written by a lady, in her name, and by her directions, to the secretary of the Society, requesting the child to be restored to her; which, however, was, as she says, refused, on the ground of poverty, and inability to provide for her child; which, she says, is untrue, inasmuch as if the child be delivered to her she will have the means of having him sent to school and supported.

In answer to this case, an affidavit has been filed on the part of the Society, which states that the first overtures with respect to the child came from the mother herself, and not from the Society; that she desired to have the child placed under the Society, and, for that purpose, handed in a certain document, signed by her, and which was required by the rules of the Society. That all this took place not two years and a-half after the father's death, but in the very year he died, and within a few months after his death. That, by the memorial, Mary Moore represented herself,

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Queen's Bench. faith of this memorial, and while Mary Moore was pregnant of
In re a posthumous child, the boy, John Edward Moore, was taken
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 That, after this, she and her daughter, Mary Jane Moore, entered
 the North Dublin Union workhouse, and were both registered as
 Protestants; and that Mary Moore, having been there confined of
 the posthumous child, she had that child baptised not by the
 Roman Catholic, but by the Protestant chaplain of the workhouse,
 and that this child died in January 1853, while the mother was
 still an inmate of the workhouse. The affidavit goes on to state
 that the child, ever since its reception, has been maintained at a
 considerable expense by the Society, has been under the care of
 Protestants, and has been instructed in the truths of Christianity
 as held by Protestants.

An affidavit in reply has been made by Mary Moore, correcting
 an error she had made in her original affidavit, as to the time
 of the death of her husband, viz., that it occurred in 1852, and
 not in 1851, as she had at first mentioned, but leaving all the
 other statements of the affidavit in answer, so far as I have men-
 tioned them, wholly untouched; and thus we have it that, while
 this woman alleges herself to be, and always to have been, a Roman
 Catholic, and that she got her children re-baptised as Protestants,
 with a view to procure the admission of this one child into the
 Protestant Orphan Society, the fact turns out to be that, after
 the child had been received by the Society, and thus all induce-
 ment to this representation taken away, this woman and her other
 child entered the workhouse, and were registered as Protestants,
 and her after-born child was there baptised as a Protestant. I
 cannot bring my mind to any other conclusion, painful though it
 be, than that Mary Moore, in putting these statements on the
 face of her affidavit, has been alleging a wilful untruth. Mr.
O'Hagan admitted that she had been guilty of falsehood in her
 memorial to the Society, with a view to secure the reception of
 the child. Bad as this false and fraudulent misrepresentation
 would have been, her present attempt, by a falsehood attested by .

her solemn oath, is still worse, and, in my judgment, renders it unsafe for the Court at all to act upon her testimony. Again, in her original affidavit, and for an obvious purpose, she conveys to the Court that, for a period of about two years and a-half, she acted as guardian for nurture to her children. It is difficult to suppose that, in speaking of a matter like this, which occurred only a few years ago, a mother could be deceived; but, to make all clear, she gives the dates, viz., the death of her husband in or about February 1851, and the giving up of the child in or about the end of December 1853. But how does the fact turn out? By her own admission, not made until after she hears that the proof of the fact is in the hands of her adversaries, she tells us that her husband did not die until February 1852; and it is proved that it was in the month of August of that year, just six months after his death, that the Society took the charge of her son, at a time when she, steeped in poverty, was struggling to support a daughter, while pregnant of a third child, and of which she was soon after delivered in the workhouse. But it is needless any further to expose the reckless statements made by this woman. It is enough to say, in the words of an eminent Judge (Lord Wynford), in the case of *Blachford v. Christian* (a), "Whenever parties are detected in such falsehoods, you have no security that any thing alleged by them is true." Notwithstanding all this, however, it is insisted by her Counsel that she, being beyond question the surviving parent of this child, an infant below the age of fourteen years, and there having been no other guardian appointed, she has a legal right to the custody as guardian for nurture; that anything she may have done in the way of handing it over to the Society cannot deprive her of that right, and that the only excepted cases are cruelty and gross immorality, of such a kind and degree as were, in the contemplation of the Court, in *Rex v. Greenhill* (b) and *Regina v. Clarke* (c), neither of which exceptions, it is said, exist in this case, qualifications of the parental right of custody; for, unless her argument goes that length, it fails. In

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(a) 1 Knapp. 73, 81.

(b) 4 Ad. & El. 624.

(c) 7 E. & B. 186.

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my judgment, they are not the sole exceptions; and, whilst I freely and fully acknowledge the right of the parent to the custody of the infant child, as a general rule, I must engraft on that rule a large exception, and say that, wherever this Court clearly sees an unfitness in the parent for the discharge of the duties of guardianship, and that it will not be for the welfare of the child that it should be delivered to the parent, this Court will, in the exercise of its sound legal discretion, forbear to issue its writ of *habeas corpus*, and to give to that parent the charge and custody of the child. I cannot bring my mind to concur with Lord Campbell, in *Regina v. Clarke*, where he says (a), "We must lay down a rule which will be generally beneficial, although it may operate harshly in particular instances." In my humble judgment, it will be better for us to seek for a principle the application of which will not be fraught with the ill consequences apprehended from the rule laid down in that case. It is a proposition which will hardly be controverted, that every child of British parents, from the moment at which it comes into existence, is clothed with all the rights and privileges of a British subject. If the individual is of mature age, and competent to invoke the protection of the law for his safety, the law has only to afford him that protection when he shall call for it; but, if he be of tender years, and so, from defect of understanding, be unable to make known his wants, guide his conduct or assert his rights, the law, for his preservation and protection, as well in person as in property, raises certain persons whom it calls guardians: some of these guardians are expressly appointed when the occasion for them arises, or is expected to arise; while, in other cases, the guardian is appointed, as it were, by a general rule of law, or, as it is said (*Com. Dig.*, tit. *Guardian D*), by the course of the law the wardship is cast upon him. Of this latter description is guardianship by nurture, which, as Mr. *Hargreave* (*Co. Lit.*, p. 88 b) tells us, "only occurs where the infant "is without any other guardian; and none can have it except "the father or mother. It extends no further than the custody and "government of the infant's person, and determines at fourteen,

(a) 7 E. & B. 194.

"in the case both of males and females," that being the age at which the law presumes that the mind of the infant will have attained sufficient maturity to enable him to protect himself. Until that period arrives, the right of guardianship, with its correlative duty of maintaining the child, is cast by the law first on the father, and, on his decease, upon the mother. But the law which thus bestows the right has reserved to itself, acting through Courts of Justice, the power of careful supervision in its exercise. The dominion which the parent has over the child is a qualified one, and given for the discharge of important trusts. He will be secured in it so long as, and no longer than, he discharges the correlative duties; a failure in them, under circumstances, and to an extent to bring on him the brand of "unfitness," amounts to a forfeiture of his right, and warrants the interposition of the proper legal tribunal for the protection of the child, by wresting from the parent the trust which he has abused, or which the Court plainly sees he is unable or unwilling to perform. But it may be said that, admitting these principles to be correctly laid down, it is the business and peculiar province of the Court of Chancery, and not of this Court, to assert and vindicate them. It is quite true that this Court may not and does not possess the machinery of a Court of Equity, to enable it to select a fit and proper person to be the guardian of a child, or to superintend and direct the maintenance and education of the child, or to correct the delinquencies of the guardian; but, at all events, it may, and, I think, ought, without undue prejudice to parental authority, hold its hand when called on to issue its writ of *habeas corpus*, in order that the father or mother should be reinstated in an office of trust for which the Court sees him or her to be unfit, and thus refuse to take a step which it plainly perceives would not be conducive to the welfare of the child. I think this view is supported as well by reason as by the authority of Courts of Law; and it is difficult to imagine how or why this Court should have engrafted at least one of the two admitted exceptions on the rule, if its only duty on this writ was to preserve the liberty of the child; as would seem to have been considered by the Court in the case I shall

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E. T. 1859. just call attention to, I mean *Rex v. Smith* (a), more fully reported, as to Lord Hardwicke's judgment, in *Ridgeway's Reports*, Lord *Queen's Bench*. Hardwicke, p. 149. That was a *habeas corpus* to bring up a child, aged thirteen, that he might be delivered from the custody of his aunt to his father. Lord Hardwicke thinks that on that writ the Court could do nothing but set the child at liberty to go where he pleased; and that, if the father sought to get the possession, he must have recourse to the writ of ravishment of ward; or, as he seems to suggest, he may take him wherever he might find him. There are few persons to whom, at this time of day, this decision will be satisfactory, notwithstanding the eminence of the Judge who pronounced it. The case of *Rex v. Delaval* (b), decided thirty years afterwards, lays down a more healthy doctrine. There, the minor, Anne Catley, was eighteen years old; and, being beyond the age of nurture, the case may not be precisely in point. It is valuable, however, for the doctrine laid down by Lord Mansfield. He says:—"In cases of writs of *habeas corpus*, directed to private persons to bring up infants, the Court is bound, *ex debito jussu*, to set the infant free from an improper restraint; but they are not bound to deliver them over to anybody, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them." And again:—"The true rule is, that the Court are to judge upon the circumstances of the particular case, and to give their directions accordingly." If this Court be, in the language of Lord Mansfield, in that case, the *custos morum* of the people, I do not see how it can with propriety exercise its jurisdiction by transferring the custody of a child, when it sees that by doing so it becomes itself ancillary to a breach of trust, and aiding in an injury to the child. In *Rex v. De Manneville* (c), Lord Ellenborough tells us that "the father is the person entitled by law to the custody of his child. If he abuse that right, to the detriment of the child, the Court will protect the child." And Mr. Justice Lawrence, citing a case before Lord Kenyon, says "that his Lordship had no doubt but

(a) 2 Str. 982.

(b) 3 Burr. 1434.

(c) 5 East, 221.

“that the father was entitled to have the custody of the infant, unless the Court saw reason to believe that he intended *to abuse his right*, by sacrificing the child.” The next case I shall refer to is *Rex v. Greenhill* (a), one of the cases relied on in support of this application. The question there was, whether the mother, who lived apart from her husband, should be compelled to give up to him the custody of their infant children, though he was living at the time in a state of adultery, but not in the house to which the children were to be brought. It is not necessary to quarrel with the decision there, though I think the public interests would not have suffered if it had been the other way. Lord Denman, after declaring that the father’s was the proper custody, proceeds:—“The Court has, it is true, intimated that the right of the father would not be acted upon where the enforcement of it would be attended with danger to the child; as, where there was an apprehension of cruelty or of contamination, by some exhibition of gross profligacy.” It is plain that these two instances were given by the learned Chief Justice merely as illustrative of what he meant to convey by the term “danger to the child;” but not as an enumeration of the dangers which a Court of Law would hold sufficient to displace the parent’s right. Having used the general word “danger,” he gives one example as affecting the child’s body, and another as affecting its mind, thus showing that both were in his contemplation. Indeed I can see no reason for saying that a Court of Law is only competent to deal with those two causes, and that any other cause which would prove dangerous to the child, either in body or mind, and so would render it inexpedient that the parent should have the custody of the child, should be deemed wholly beyond the powers and authority of a Court of Law to deal with it, and that this Court, when called upon by writ of *habeas corpus*, must first do a wrong, in order that a Court of Equity may, if it have the opportunity, undo it. If this be a sound interpretation of the case of *Rex v. Greenhill*, and of the law on the subject, it follows, almost as a matter of course, that the case of *Ex parte Skinner* (b) ought not to bind this Court to the extent sought by the applicant;

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(a) 4 Ad. & El. 624.

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E. T. 1859. *Queen's Bench.* for who can say that the bringing a child into daily contact with his father's kept mistress, up to the age of fourteen, was not fraught with extensive danger to the morals of the child? The only point there decided was, that the Court of Common Pleas had no jurisdiction to take the child from its father. The same point, and no more, was decided in *In re Hakewill* (a). The last case on this subject in a Court of Law is *Regina v. Clarke* (b). In that case, the Court seems altogether to ignore any reference to the child's intellectual attainments or religious principles, and seems prepared to apply the same rule, whether the child's age be three or thirteen, declaring that the only thing to be considered in derogation of the parental right is the immorality or illegal conduct of the parent, or whether the application is made *bona fide* (p. 200). Now, while I freely admit that, for our present purpose, we should regard all religions as alike in the eye of the law, I think all our experience will lead to the conclusion that it would be very dangerous if a child, having received religious impressions of one kind, were, in the course of its education, to be then submitted to a religious training of an opposite kind. The result to be expected is, that all religious impression would be erased, and immorality, and perhaps atheism itself, take root in its stead. The decision of the Vice-Chancellor Kindersley, in this very *Case of Alicia Race*, where he advised the child to be brought up in the religion of its father, corroborates the view I have taken, and shows that, in his opinion, by an opposite course the child's best interests would have been imperilled. The case of *Stourton v. Stourton* (c) is to the same effect. There the infant was not quite ten years old. Its father had been a Roman Catholic, and, after his decease, the mother, having become a Protestant, had her son educated in her own faith, rather than in that of her deceased husband. After allowing this to go on for some years, the Roman Catholic relatives interfered, and called on the Court to have the child educated in the religion of the father. In dismissing an appeal from the Master of the Rolls, who had refused this application, Sir Knight Bruce said:—"An application might have been made to the

(a) 12 C. B. 223.

(b) 7 El. & Bl. 186.

(c) 3 Jur., N. S., 527.

"Court, before the mind of the child had been religiously biassed; in which case his education in the principles of his father would, no doubt, have been ordered. Could this be done now?" And Lord Justice Turner said that, "When an infant became a ward of Court, the duty of the Court was to consult the welfare of the infant; and, in so doing, the Court recognised no religious distinctions. If, consistently with the duty of the Court, the wishes of the father could be attended to, the Court paid attention to those wishes; but if they could not be carried into effect without sacrificing what the Court considered to be for the benefit of the child, they could not be attended to." And again—"It had been urged at the Bar, that so young a child's impressions were not fixed, and could be removed. That might be so; but might it not be that these impressions would lead to religious instruction by a person of another faith being received with indifference, or, which was worse, with affected acquiescence? Might not a change of religious education end by leaving him with no fixed impressions at all?" But it may again be said, that these considerations are peculiarly for a Court of Chancery, and not for a Court of Law. I do not assent to this doctrine; for though the Court of Chancery has a jurisdiction and machinery for regulating the education and maintenance of its wards during the whole period of their minority, which this Court does not possess, and though this Court can only determine the custody of the child at the particular time when its aid is invoked, and thus its powers are far more restricted in their range than those of a Court of Equity, there is no reason for saying that the principle which guides the one tribunal, viz., the welfare of the child, should not also guide the other; the more especially when, if this principle be rejected by a Court of Law, the practical consequence to be expected is, that serious injury may frequently be inflicted, by placing the child in the custody of a person of whom the Court of Chancery would disapprove; as occurred in *Alicia Race's case*; and that injury will prove irremediable in case the child should be removed out of the jurisdiction, or, being within the jurisdiction, should not have property sufficient not only to call the powers of a Court of Equity into active exercise in its behalf, but

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also to meet the steady and continuous disbursement in respect of the costs of guardianship: *Wellesley v. The Duke of Beaufort* (a). It is said, also, that Mary Moore, having once been guardian for nurture of her infant child, cannot, by the memorial in question and her dealing with the Society, or by any other act of hers, divest herself of the personal trust which the law has reposed in her. It may, perhaps, be admitted, on the authority of *Villareal v. Mellish* (b), *Reynolds v. Lady Teynham* (c), *Regina v. Smith* (d), that, though this woman had entered into the most formal contract for divesting herself of the duties and responsibilities as well as the powers and authorities of a guardian—in a word, did her utmost to assign the office of guardian, she might the next moment have set all at naught, and reclaimed the child. But that is not the question here. I take that question to be, whether, after this woman has for seven years abnegated all the functions of a guardian, and allowed and encouraged other persons to assume and discharge those functions, and to educate the child in a religious faith different from that which she now professes, will this Court, in virtue of the jurisdiction it possesses for the benefit of the child, lend its powers to enable the mother now at her pleasure to undo that which, for the last seven years, she has been doing, and all this without the least complaint, either proved or alleged, against the members or officers of the Society, for neglect of the duties which, by receiving the child, they virtually undertook to discharge? The Court cannot but apprehend that it is the intention of the mother, on recovering the possession of this child, to bring it up in a religion different not only from that in which it has hitherto been trained, but also from that of its father. And this, according to the case *In re Hunt* (e), she ought not to be allowed to do. The case of *Lyons v. Blenkin* (f), and the observations of the Lord Chancellor, in refusing to accede to the application of a father for removal of his infant children from their aunt, afford us valuable assistance:—"All their habits," he says, "have been acquired under the roof of their aunt; all their convictions

(a) 2 Russ. 1, 21.

(b) 2 Swanst. 533.

(c) 9 Mod. 40.

(d) 17 Jur. 24.

(e) 2 Con. & L. 373.

(f) Jac. 245, 263.

“ have been formed under their aunt ; and it appears to me, that
 “ the father has so far given his consent to this course of education
 “ as to preclude him from saying that he shall now be permitted to
 “ break in and introduce a new system of education, which cannot
 “ be consistent with the system to which they have been habituated.”

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Mr. Justice Patteson, sitting in a Court of Law, acknowledged and acted upon the authority of this case, when, in *Ex parte Preston (a)*, he refused, at the instance of the mother, to order a child to be delivered up by persons under whose care and superintendence it had, for a considerable time, been maintained and educated, with the authority and approbation of the mother.

For the reasons I have stated, I am of opinion that the Court ought not to issue its *habeas corpus* for the removal of this child from its present custody, and, accordingly, that the conditional order ought to be discharged.

O'BRIEN, J.

In this case, I am of opinion that the application for the writ of *habeas corpus* ought to be granted ; and it is therefore requisite for me to refer to all the objections to the application which have been relied on by Counsel for the Rev. Mr. O'Meara, acting for the Protestant Orphan Society. The child in question is nine or ten years of age. His father died in 1852, without having appointed any guardian by deed or will ; and thereupon, according to the general rule of law, his mother, the present applicant, became entitled, as guardian for nurture, to the custody of the child, until he should attain the age of fourteen years (being the period fixed by law for the determination of this species of guardianship), and she acquired the same legal right to the custody of the child during that period, and the same power of enforcing that right by writ of *habeas corpus* as would have belonged to the father (if alive), or to the guardian (if any) duly appointed by him. It is unnecessary to cite authorities for this proposition, which has not indeed been controverted in the argument. It is true, however, that in various cases it has been held that certain circumstances would constitute exceptions to this

(a) 11 Jur. 1039 ; S. C., 5 D. & L. 233.

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rule, and would be sufficient grounds to induce a Court of Law to refuse to the parent or guardian the assistance of this writ; and it is contended that such circumstances exist in the present case. I shall presently refer to those cases; but I shall first consider to what extent the Court should interfere where those exceptional circumstances do not exist; whether they should give the custody of the child to the parent or guardian, or whether, as contended by Mr. O'Meara's Counsel, the Court should interfere no further than to have the child brought into Court, ascertain his wishes by examination, and then (if the child have sufficient intellect to be capable of making a choice) allow him to go where he pleases.

Upon this question, I think the clear result of the authorities to be that, with respect to a *legitimate* child, under the age of fourteen years, the Court (if the exceptional circumstances to which I have referred do not exist) should have regard only to the legal rights of guardianship, and should, without reference to the wishes of the child, deliver him or her to the custody of the father or mother, or other legal guardian, as the case may be. Whatever doubt may have existed on this question, from the case of *The King v. Smith* (a), and some other early cases, is, I think, completely removed by several more recent decisions of high authority. It is only necessary to refer to one of them, that of *The Queen v. Clarke* (b), commonly called *Alicia Race's case*, in which the leading authorities on the subject are reviewed, and in which Lord Campbell states (pp. 193 and 194), "That the great use of the writ was to set at liberty "any of the Queen's subjects unlawfully imprisoned; and that, with "respect to a child under guardianship for nurture, the child was "supposed to be unlawfully imprisoned, when unlawfully detained "from the custody of the guardian, and that, when delivered to the "guardian, the child was supposed to be set at liberty." In a subsequent part of his judgment, after referring to the inconvenient consequences that would result from allowing a child, during the period of guardianship for nurture, to exercise a choice, and select a custody different from that of the legal guardian of such child, and referring; amongst other authorities, to the case of *The King v.*

(a) 2 Strange, 982.

(b) 7 El. & Bl. 186.

Greenhill (a), Lord Campbell states (pp. 196 and 197) that the age of fourteen years (being the period when guardianship for nurture ceases) was the period within which the Court would, without any examination of the child, order the child to be delivered to the parent or guardian. The *Case of Anne Lloyd* (b) has, however, been relied on in the argument, as opposed to this doctrine. In that case, an *illegitimate* child about *eleven* years old was, in pursuance of a *habeas corpus* obtained by her mother, brought up before the Court of Common Pleas by her supposed father, in whose custody she had been, and who, as the child was *illegitimate*, had no legal right to her guardianship or custody. The child was examined by the Court, as to whether she wished to go with her mother; and, having expressed a strong disinclination to do so, the Court refused to deliver her to the mother, and allowed her to remain with her supposed father, though he had, as already mentioned, no legal right to her guardianship. But it appears, from the observations of the Judges in that case, and from the comments on it by Lord Campbell, in *Alicia Race's case* (c), that the ground of the decision was that, as the child was *illegitimate*, and beyond the age of seven years (being the period up to which a mother is entitled to the custody of an *illegitimate* child), the mother had no legal right to the guardianship. There was, therefore, no person legally entitled to such custody or guardianship; and there was no other criterion, except the choice and wishes of the child, for the Court to determine in what custody she should remain. That case, therefore, is no authority for the proposition that the Court should withhold from the legal guardian the custody of a legitimate child, under the age of fourteen, upon the ground of the wish of the child to remain in other custody.

It was also contended, by Mr. O'Meara's Counsel, that though, under certain circumstances, the Court may refuse to take a child out of the custody of the parent or legal guardian, yet it did not therefore follow that the Court would, under similar circumstances, interfere to give the child to such parent or guardian. But this

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(a) 4 Ad. & El. 624, 643.

(b) 3 M. & G. 547.

(c) 7 El. & Bl. 198.

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proposition is altogether at variance with several of the cases to which I shall hereafter refer, and particularly with the observations of Patteson, J., in the *The King v. Greenhill* (a), upon this very question, which clearly show that a Court of Law should act upon the same principles, when the parent or guardian entitled to the legal custody of the child applies to the Court for such custody, as they would act upon if an application was made to take the child from such custody.

We have next to consider what are the exceptional circumstances, which, as I have already observed, have been considered by Courts of Law as disentitling the legal guardian to the custody of a child, and whether such circumstances exist in the present case. Upon a review of the authorities there will, I think, be no difficulty in ascertaining what those exceptional circumstances are, and what are the principles by which Courts of Law should be guided in deciding whether, in any particular case, they should refuse to enforce the rights of the legal guardian. It will, I think, be found that those principles are clear and well defined. If it were otherwise, the exercise of this branch of our jurisdiction would be attended with great and embarrassing uncertainty. In considering the authorities on this subject, we should, however, recollect the material distinction that exists between the principles which guide Courts of Law and those which guide the Court of Chancery, with regard to the custody of children, because many of the cases which have been relied on in the argument, as authorities against the present application, were cases in the Court of Chancery, and have, in my opinion, no application whatever to the question whether a Court of Law should or should not assert the rights of the legal guardians. The jurisdiction of Courts of Law, in interfering by *habeas corpus* with the custody of children, is grounded on the supposition that children of a certain age were under illegal restraint when they were under illegal custody, and that they were removed from such restraint by being placed in the custody of their legal guardian: *The King v. Greenhill* (b), and *The Queen v. Clarke* (c); but the jurisdiction of the

(a) 4 Ad. & El. 624.

(b) 4 Ad. & El. 643.

(c) 7 El. & Bl. 193.

Court of Chancery rests upon very different grounds, and accordingly that Court, in the exercise of such jurisdiction, acts upon many principles which could not be recognised in a Court of Law. In the case of *Ex parte Skinner* (a), West, C. J., says, "The Court of Chancery has a jurisdiction as representing the King as *parens patriæ*, and that Court may, accordingly, under circumstances, control the right of a father to the possession of his child, and appoint a proper person to watch over its morals, and see that it receives proper instruction and education." In the *Case of the Infant Caroline De Manneville* (reported in 5 *East*, p. 221, and 10 *Ves.*, p. 59), the Court of King's Bench, upon a proceeding on the part of the mother by *habeas corpus*, had refused to take the child from the custody of her father, on the ground that he had a legal right to such custody. The mother then filed a bill in the Court of Chancery, and applied there for the custody of the child; and Lord Eldon, referring to the decision of the King's Bench, says (10 *Ves.*, p. 59), "I am not surprised at it; for that Court has not within it, by its constitution, any of that species of delegated authority that exists in the King as *parens patriæ*, and resides in the Court of Chancery as representing his Majesty." This distinction between the principles of the two Courts is again recognised by Lord Eldon, in the case of *Lyons v. Blenkin* (b), and in the *Anonymous case* reported in *Jac.*, p. 254 n; in which latter case he stated that the jurisdiction which even the Chancellor had upon a writ of *habeas corpus* was exactly the same as if it was before a Judge; but that, when an infant was a ward of the Court of Chancery, there were many circumstances to which he could give attention, which would not weigh with him upon a *habeas corpus* alone. The observations of Mr. Justice Patteson, in *Ex parte M'Clellan* (c), and of Lord Campbell, in *Alicia Race's case* (d), show that they admitted and acted upon this distinction; and Lord St. Leonards, in a recent publication (e), also recognises the difference between the grounds upon which the custody of a child could be refused to a

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(a) 9 B. Moo. 282.

(b) *Jac.* 254, 255.

(c) 1 Dowl. P. C. 85.

(d) 7 Ell. & Bl. 202, 203.

(e) *Handy Book*, 82, 83.

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parent by a Judge, upon a *habeas corpus*, or by the Court of Chancery, where the child was a ward of that Court. It is unnecessary to add to these high authorities others which might be cited to the same effect; and I was surprised to hear it contended, in the argument of this case, that the Courts of Law and Chancery act upon the same principles in controlling the *prima facie* legal right of the parent or guardian to the custody of a child; on the contrary, it clearly follows, from the authorities to which I have referred, that there are many circumstances which, though sufficient grounds for the Court of Chancery to interfere with the rights of the parent or guardian to the custody of a child, would not authorise a Court of Law to refuse the operation of those rights by *habeas corpus*. The application now before us is principally opposed upon the ground of the mother's misconduct; and, before observing upon the facts of the case, I shall first refer to some authorities, for the purpose of showing what the degree of misconduct on the part of a parent should be, to constitute sufficient ground for a Court of Law refusing the custody of a child to a parent who would be otherwise legally entitled to it. In some of those cases we shall find that the question arose as to the misconduct of the *father*, who claimed the custody of his child, as against the mother; but that circumstance does not affect the principle to be collected from those cases, because, during the lifetime of the father, he is *prima facie* legally entitled to the custody of his children; and where, as in the present instance, the father has died without appointing a guardian, and the mother survives, then, as I have already mentioned, the mother has the same legal right to the custody of a child under fourteen years of age as the father, if living, would have had. In the case of *Ex parte Skinner (a)*, a wife applied, upon a writ of *habeas corpus*, against her husband, for the custody of their child, aged about six years. It appeared that the husband was actually in gaol for debt, and living there in a state of adultery with another woman; but the Court of Common Pleas refused to comply with the application, or to interfere with the legal rights of the father to the custody of the child, upon the ground (as stated by Chief Justice West) that they had no

(a) 9 B. Moo. 278.

authority to do so, as there was no charge of ill-treatment by the father. In *The King v. De Manneville* (a), to which I have already referred, Lord Ellenborough said that the father was entitled by law to the custody of the child, but that, if he abused that right, to the detriment of the child, the Court would protect the child. In the *Anonymous case* (b) already mentioned, Lord Eldon stated his opinion that, upon an application by *habeas corpus*, nothing but cruelty or ill-usage to the child would be a ground for taking a child from its father. In *Ex parte M'Clellan* (c), Patteson, J., states that the Court would not interfere with the right of the father to the custody of the child, where there was nothing "to lead them to suppose that "any ill-usage had been exercised by the father, or by the school-mistress with whom the father wished the child to be placed." But the case of *The King v. Greenhill* (d) affords a much stronger instance of the principles upon which Courts of Law should act in deciding whether they would assert or disregard the legal rights of the parent or guardian to the custody of a child. In that case, Mr. Greenhill had applied upon *habeas corpus* that his wife should deliver up to him their three daughters, the eldest of whom was about six years old. It appeared that his wife had left him, in consequence of his continued adultery with a Mrs. Graham, with whom he lived at various places as man and wife, under the same name. His immorality and misconduct were relied on as grounds for disentitling him to the interference of the Court to restore the children to him; but the Court, notwithstanding these facts, decided that he was entitled to the custody of the children. Lord Denman, in giving judgment, after referring to the legal right of the father to the custody of the child, says (p. 640):—"The Court has, it is true, "intimated that the right of the father would not be acted upon "where the enforcement of it would be attended with danger to the "child, as where there was an apprehension of cruelty, or of contamination, by some exhibition of gross profligacy. But here it is "impossible to say that such danger exists. Although there is an "illicit connexion between Mr. Greenhill and Mrs. Graham, it is

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(a) 5 East, 223.

(b) Jac. 454 n.

(c) 1 Dowl. P. C. 86.

(d) 4 Ad. & El. 624.

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"not pretended that she is keeping the house to which the children are to be brought, or that there is anything in the conduct of the parties so offensive to decency as to render it improper that the children should be left under the control of the father; and it promises to observe the same conduct with respect to them for the future." The rest of the Court concurred in the decision; and Coleridge, J., after stating the presumption of law to be, that the legal custody of the children belonged to the father, says (p. 643):—"Yet, if it be shown that cruelty or corruption would be apprehended from the father, a counter-presumption arises; that, however, is not raised here." The principle upon which Lord Denman and the Court of King's Bench acted in the foregoing case, as to the effect of the father's immoral conduct, had been previously recognised, even by the Court of Chancery, in *Ball v. Ball* (a), where, in refusing a petition by a mother for the custody of her daughter, aged about fourteen years, which was grounded on the fact, amongst others, of the father living in adultery with another woman, the Vice-Chancellor states:—"This Court has nothing to do with the fact of the father's adultery, unless the father brings the child into contact with the woman. All the cases on this subject go upon that distinction, when adultery is the ground of a petition for depriving the father of his Common Law right over the custody of his child." Another decision of a Court of Common Law is that in the case of *In re Pulbrook* (b), which was not cited in the argument, where an application was made by the father against the mother upon *habeas corpus*, to obtain from her the custody of their child, aged about nine years. It appeared, from the affidavits, that the father, by his drunkenness, immorality and ill-usage, had forced his wife to leave him; that he was in a state of utter destitution, without a house or regular business; that he was unable, out of his own means, to provide a fitting education for the child, and that the wife's father, with whom she then lived, was perfectly able and willing to do so. Erle, J., however, notwithstanding these facts, decided that the father was entitled to the custody of the child. Some earlier cases have been relied on in

(a) 2 Sim. 35.

(b) 11 Jur. 185.

the argument, particularly the case of *The King v. Delaval* (a), where the Court refused to deliver a girl of about *eighteen* years of age to the custody of her father, and ordered that she should be at liberty to go where she pleased; but Lord Mansfield, in stating the grounds of his decision, referred to the circumstances of the case, that it appeared that the girl had received ill-usage from her father, and that there was ground for suspecting that the father had been party to a conspiracy to place his daughter with Sir F. Delaval, for the purpose of prostitution. Lord Mansfield also explains, in his judgment, the ground of the decision in *The King v. Smith* (b), which was another of the cases relied on against the present application. Whatever doubt, therefore, might have existed from those earlier cases, if they stood alone, they cannot, I think, be now relied on as a ground for our adopting, upon the question of the misconduct of parents disentitling them to the custody of their children, a principle different from that which has been established by those several more recent cases of high authority already referred to, and which has been so lately recognised by Lord Campbell, in *Alicia Race's case* (c); where, after stating that "the mother may have forfeited her right to the custody of the child, by prior immoral conduct," he explains that statement in the next sentence, by saying that, "according to the *The King v. Greenhill*, the immorality, "to extinguish the right of the parent or guardian to the custody of the child, must be of a gross nature, so that the child would be in "serious danger of contamination by living with him." In the present case, the misconduct on the part of the mother (Mrs. Moore), by which it is contended that she has forfeited her right to the custody of her son, was the system of deception and falsehood to which she resorted in 1852, for the purpose of procuring admission for her son into the Protestant Orphan Society. It appears that her husband died in February 1852, although, in her first affidavit for this motion, she stated that he died in February 1851. This statement was manifestly made by mistake, and is set right by her second affidavit, in which she refers to the certificate of her hus-

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(a) 3 Burr. 1434.

(b) 2 Strange, 962.

(c) 7 EL. & BL. 200.

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band's burial, or the receipt of the burial fees, dated in February 1852, and in the possession of the attorney for the Orphan Society. According to her first affidavit, her son was born in March 1849; but, in her application to the Orphan Society, she states that he was born in March 1850. There were also two daughters of the marriage; one of them was older than the son, and the other was born in October 1852, between seven and eight months after the husband's death. Mrs. Moore was in great distress at her husband's death; and, in May 1852, in order to provide for her son's support, she applied to the Protestant Orphan Society for his admission into that establishment. On that occasion, she signed an application for his admission, in which she described herself and her son as Protestants; and she also had her son and eldest daughter baptised in St. George's Protestant Church, although, as it now appears, she had been until then a Roman Catholic, and the two children had been, in their father's lifetime, baptised as Roman Catholics. The son was admitted into the Orphan Society in July 1852, and not, as stated in her first affidavit, in December 1853. In October 1852, immediately after the birth of her second daughter, she and her two daughters were admitted into the North Dublin poor-house, and registered as Protestants. The second daughter was baptised by the Protestant Chaplain, and died in February 1853. Mrs. Moore was discharged from the poor-house in April 1853.

The mis-statements in Mrs. Moore's first affidavit, as to the dates of her husband's death, of her son's admission to the Orphan Society, &c., have been observed on in the argument; but I see no ground for supposing that those mis-statements were deliberately made by her, with a knowledge of their untruth. The application to the Orphan Society, and the certificate or receipt for fees of her husband's burial, showing the correct dates, were, to her knowledge, in the possession of the officers of the Society, and were referred to by her, and her mis-statements, as to those dates, in her affidavit, were manifestly by mistake. With respect, however, to the deception and falsehood resorted to by her in 1852, as to the religion of herself and her children, her conduct cannot be too strongly condemned. Her poverty may have been the cause, but is no justifica-

tion of the course she adopted. And though similar temptations have been yielded to, though instances occur of parties being induced, for pecuniary considerations, to abandon the religion which they had professed, her misconduct on that occasion is deserving of the severest censure. But the question for our consideration is, whether, having regard to the authorities to which I have referred, her misconduct in 1852 (for in no other respect has her character been impeached) is a sufficient ground for a Court of Law to refuse to her now the custody of her son, and whether we can do so consistently with those authorities? In the cases above mentioned, of *Ex parte Skinner* (a), and *The King v. Greenhill* (b), the fact of the father living in an acknowledged state of adultery, at the very time of the application to the Court, was held not to be sufficient ground for disentitling him to the custody of his children. In the case of *In re Pulbrook* (c), the father, notwithstanding his continued drunkenness and immorality, and his ill-usage of his wife, was also declared entitled to the custody of his child; and in the case of *Ball v. Ball* (d), already mentioned, we find a similar principle acted on even by the Court of Chancery (though possessing a more extensive jurisdiction than Courts of Law in the controlling of parental rights), where the child was a girl of fourteen years of age; and yet the continued adultery of the father was held not to be a ground for depriving him of her custody. There is no charge or suggestion here of any ill-usage or ill-treatment, on the part of Mrs. Moore, towards her son; by which also, according to other cases, her right, even at Law, to his custody would be forfeited. And, however strongly we must condemn her misconduct in 1852, we cannot, in my opinion, consistently with the several authorities to which I have referred, hold that by such misconduct she has forfeited that right. It is undoubtedly essential, for the proper moral training and education of children, that the principles of truth should be inculcated on their minds; and it has been contended that the reckless disregard of truth evinced by Mrs. Moore in 1852, on a subject so sacred as the religion of herself and her children, shows

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(a) 9 B. Moore, 278.

(b) 4 Ad. & E. 624.

(c) 11 Jurist, 183.

(d) 2 Sim. 35.

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MOORE. that her son would be exposed to the danger of moral corruption by being now delivered to her care. But if, as stated by Lord Campbell, in *Alicia Race's case* (a), when referring to *The King v. Greenhill*, "the immorality, to extinguish the right of a parent or guardian to the custody of a child, must be of a gross nature, so that the child would be in serious danger of contamination by living with him," and if the circumstances existing in the cases of *The King v. Greenhill* and *Ball v. Ball*, of the continued immorality and adultery of the father, were not considered as sufficient to justify the Court in refusing to him the custody of his daughters, on the ground of such danger, how can it be held that the deception and falsehood practised by Mrs. Moore, in 1852, are a sufficient ground for refusing to her the custody of her son? A distinction was suggested by Mr. O'Meara's Counsel between *Greenhill's case* and the present, on the ground that Mr. Greenhill had undertaken not to bring his daughters into the same house with his mistress, or into intercourse with her; whereas, in the present case, it is said that, by granting this application, the child would live with and be educated by his mother, who has shown, by her misconduct, that such a result would be attended with danger to the moral character of the child. But that circumstance in *Greenhill's case* does not affect the ground upon which the decision in it is applicable to the case now before us; because, notwithstanding the undertaking given by Mr. Greenhill, the objection would have still remained, that *his own* misconduct and immorality were such as to give grounds for apprehending danger to the moral character of his daughters, by leaving them and their education under his control, even though he should not bring them into intercourse with his mistress. And it was considered in that case, that the fact of Mr. Greenhill being at the time separated from his wife, and admittedly living in adultery, did not furnish sufficient grounds for the apprehension of such danger, to justify the Court in refusing him the custody of his daughters. It appears to me that, consistently with that decision (which has been approved of in the subsequent cases to which I have referred), we cannot now hold that Mrs. Moore is disentitled

(a) 7 El. & Bl. 200.

to the custody of her son, on the ground that, by reason of her misconduct and falsehoods in 1852, there would be danger of corruption to his moral character from his living with her. We should, I think, be going beyond those limits which have been, by so many authorities, prescribed to Courts of Law for the exercise of their jurisdiction in controlling parental rights, if we should now decide that parents forfeited their right to the custody of their children, by falsehoods even so serious and reprehensible as those resorted to by Mrs. Moore. In my opinion, such a decision would not only be at variance with authority, but would be attended with most embarrassing and injurious results.

Mrs. Moore's application is opposed, upon the further ground that, by the document which she signed in May 1852, and by her acquiescence for so many years in the arrangement then made by the Orphan Society, she has (independently of her misconduct) lost or relinquished her right to claim from the Society the custody of her son. It appears that, in August 1852, the boy was placed by the Society in the care of a nurse in the county Wicklow; that Mrs. Moore saw him in Dublin, in the months of April 1854, 1855 and 1856, when the children, under care of the Society, were brought up to Dublin for inspection, and that she did not, on those occasions, express any dissatisfaction at his remaining under their care. In June 1856, Mrs. Moore, for the first time, required to get back her son, and applied for that purpose to a Mrs. Evans, the nurse in whose care he then was, and (having been refused by Mrs. Evans) she then applied to the Society, who also refused her application, on the ground that she had not the means of supporting the child. Shortly after this refusal she applied to a Magistrate to assist her in getting back her son, but he declined to interfere. In April 1857, Mrs. Moore, on going to the usual place for the inspection of the children in Dublin, found that her son was not there, and was about that time informed by Mrs. Evans that the boy had been removed from her care, shortly after Mrs. Moore's application in 1856. It appears that he was placed under the care of a Mrs. Shiels, and was carried into a different part of the county. Mrs. Moore again applied for her child, in January 1858, to the Society and to Mrs.

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Shiels, and shortly afterwards, in the same month, obtained the present conditional order. The document or application to the Society, signed by Mrs. Moore in May 1852, contains an agreement and consent by her, that "her son should be entirely given up to the "care and management of the committee of the Society, to be by "them disposed of, and, when fit, apprenticed or otherwise provided "for in such place and manner as the committee may decide." And it is contended, for the Orphan Society, that Mrs. Moore, by that agreement, and her acquiescence since, has lost her right, as guardian for nurture, to the custody of her son. It was suggested, in the argument for the Society, that this document should be considered as analogous to an indenture of apprenticeship, whereby a father would give up to the master his right to the custody of his child, during the period of apprenticeship. But this analogy cannot be sustained; the child has not been apprenticed, and the document of May 1852 imposes upon the Society no such reciprocal obligations as would be imposed upon a master by a deed of apprenticeship. It is, therefore, unnecessary to consider the question raised by Mrs. Moore's Counsel, that no document such as this (not being a deed under seal) could have the effect of creating an apprenticeship, or of conferring the right consequent on that relation. It has, however, been further contended that this document (independent of any question of apprenticeship) operated as an assignment or relinquishment, by Mrs. Moore to the Society, of her right to the custody of her son. Now even supposing that the right of a guardian for nurture to the custody of a child could be irrevocably assigned or relinquished, it would be difficult to maintain that this document could have that operation (being made not to a particular person by name, but to the Society or their committee, an uncertain and fluctuating body), or that anyone would acquire, under this document, the right of the legal guardian to that custody. But I think it clearly established, by the authorities, that any assignment or relinquishment by a guardian for nurture of the right to the custody of a child (however formally made) is, in a *Court of Law*, considered as revocable at the will of the guardian, and that the guardian does not thereby divest himself either of his rights or duties as to the custody

of the child. We have been referred to several authorities on this question, some of a very early date. So far back as the *Year Book* (8 *Edw.* 4, p. 7 *b*), it is laid down, that if a guardian for nurture deliver the infant to another person for instruction, that other person is only the deputy of the guardian, and that the guardian may re-take the infant when he pleases. The same doctrine will be found in *Brook's Abridgment*, tit. *Guardian*, s. 70, and in *Comyn's Digest*, tit. *Guardian*, D. In the case of *Bidell v. Constable* (a), it is also laid down that guardianship by nurture, being a personal right or trust for the benefit of the child, without any interest in the guardian, cannot be assigned. And the authority of this last case was recognised by Lord Hardwicke in *Villareal v. Mellish* (b), where he stated that such a guardianship was not assignable. Again, in the *Case of Lord Westmeath* (c), upon an application by him to Lord Eldon for a *habeas corpus* against his wife for the custody of his infant children, Lord Eldon made an order that they should be delivered up to him, though he had by deed covenanted that they should reside with and be educated by his wife. In the case of *The Queen v. Smith* (d), which was not cited in the argument, the father, in May 1852, had entered into an agreement with Smith, the brother of his wife, whereby, in consideration of Smith agreeing to provide for the child (a girl of about five years of age), the father agreed to permit the child to reside with Smith till she should be grown up, and to pay a certain sum towards her support, and not to interfere with Smith in the bringing up of the child, or to remove her from his care. After the child had resided with and been supported by Smith for several months, the father applied, by *habeas corpus*, to have the child delivered up to him; and the application was opposed, not only upon the ground of the father's former dissolute conduct, but also upon the ground that the father, having entered into such agreement with Smith, was precluded from applying for the assistance of the Court to enforce his paternal right. Erle, J., was of opinion that the objection from the father's former misconduct was not sustainable; and with respect to the other ground of ob-

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(a) Vaughan, 177, 181.

(b) 2 Swanst. 537 n.

(c) Jac. 251 n.

(d) 22 Law Jour., Q. B., 117.

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jection, he held (after considering the cases), that the arrangement made with Smith was in the nature of a consent; that the father was at liberty to revoke that consent, and was legally entitled to the custody of his daughter, who accordingly was given up to him.

The same principle is recognised by Lord Campbell in *Alicia Race's case* (a), where he states that the Commissioners of the Patriotic Fund were wrong in supposing that the mother, by committing her child to their care to be educated, had lost all control over her; and he refers to and approves of the case I have already cited from the *Year Books*. Mr. O'Meara's Counsel have relied on the case of *In re Preston* (b), in which Patteson, J., refused an application, by *habeas corpus*, for the custody of a child about nine years old, whose father was dead, made by two persons claiming under a power of attorney, executed by the mother, who was resident in India, and who had married again. Several years previously, the mother had sent the boy to his paternal grandmother, who afterwards died, and left property to trustees for the child. The trustees had managed the property, taken care of the child and placed him at school; and the mother had, on various occasions, expressed herself satisfied with the treatment of the child. It appears that in refusing the application, Patteson, J., relied, amongst other things, on the fact of the mother having, for so many years, acquiesced in the child remaining under the care of the trustees; but that ground was not relied on in the argument by the Counsel who opposed the application, and the consideration of it was not necessary for the decision of the case. The principal objections relied on in the argument were, that the application was not made by the mother herself, but by persons claiming under a power of attorney, executed by her (she being then a married woman); that the parties making the application had acquired, under that instrument, no legal right to the custody of the child; that the Court could only interfere on the application of the mother, who then resided abroad, and that there was no one before the Court capable of receiving the child into proper custody, if taken from the trustees. On referring to the judgment of Patteson, J., it will be found that he

(a) 7 El. & Bl. 204.

(b) 5 Dowl. & Low. 233.

relies also upon the objections as to the power of attorney, and the mother's residence abroad. And Lord Campbell, in *Alicia Race's case* (a), appears to rest the decision of Justice Patteson upon these objections, and cites an opinion given by the same learned Judge, in another case, as showing that he did not consider that a parent would be bound by an arrangement made with other parties for the care or education of a child, or would be precluded thereby, in a Court of Law, from afterwards claiming the custody of that child. I find the same principle was acted on by the Court of Queen's Bench in England, in the case of *The King v. Foley* (b), where the father of two children had, on the death of his wife, requested her father and mother to come from America, where they then resided, to take charge of the children. They accordingly did so, and kept the children for about four years. The father then died, and by his will appointed other persons guardians of the children, who afterwards applied, by *habeas corpus*, against the grandfather and grandmother of the children, for their custody. The application was granted, notwithstanding the arrangement made by the father, and his acquiescence in it for so many years, and the reluctance of the Court to interfere with those arrangements. They stated that the legal rights of the guardians should prevail. I think, therefore, it clearly follows, from the foregoing authorities, that the agreement entered into by Mrs. Moore, by the document of May 1852, to give up her son to the care of the Orphan Society, should not, in a Court of Law, be considered as now binding upon her, or as precluding her from now applying for his custody. And, indeed, the Chancery cases of *Hope v. Hope* (c), *Vansittart v. Vansittart* (d), and *Walrond v. Walrond* (e), to which we have been referred in the argument, shows that even in the Court of Chancery it is not considered that the right of a parent to the custody of an infant child is forfeited by the mere circumstance of the parent having by deed or otherwise agreed to forego that right, and to commit the care and education of the child to another party, although

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(a) 7 El. & Bl. 199.

(b) 5 Ad. & E. 441.

(c) 26 Law Jour., Chan., 424.

(d) 27 Law Jour., Chan., 224, 289; S. C., 2 De G. & J. 256.

(e) 28 Law Jour., Chan., 101.

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in some cases that Court (acting upon those peculiar principles of its jurisdiction to which I have already referred) will, for the benefit of the child, control the parental rights, and prevent a parent from capriciously altering an arrangement which had been deliberately made, the violation of which would be injurious to the interests of the child, and would interfere with those prospects which had been opened to him with the parent's consent.

The distinction already mentioned, between the principles of Courts of Law and of the Court of Chancery, with regard to the custody of children, bears peculiarly upon another ground of objection urged against the present application, namely, that Mrs. Moore is altogether destitute of means for the support of her son, and that it would be injurious to his interests to vary the arrangements which she made in 1852, and in which she so long acquiesced, and to take from the care of the Orphan Society, of whose treatment of him no complaint has been made. With respect to this ground of objection (and without attaching any importance to the statement in Mrs. Moore's affidavit, that upon the child being given up to her she expects to have the means of properly maintaining and educating him), it is, I think, clearly settled that such matters are not for the consideration of a Court of Law, upon an application, by *habeas corpus*, for the custody of a child, but can only be acted upon by the Court of Chancery on a proceeding to make the child a ward of that Court. The legal right of a parent to claim the assistance of this writ for recovering the child may (as we have seen) be forfeited by criminal conduct of a certain character, or by actual ill-usage of the child; but not by poverty, or by the inability of the parent to procure for the child the care and education which the child would receive by being left with other parties. It would be attended with very serious and novel results, to hold that the circumstance of a parent having confided a child to the care of a charitable institution, and left him there for some years, should, by reason of the poverty or destitution of the parent, operate, in a Court of Law, as a severance of the parental tie, so far as to deprive the parent of the right to the society and custody of the child. In my opinion, the authorities on the subject are opposed to such a

proposition, and should govern the present case, even if the benefits resulting to the child, from his being left with the Orphan Society, were of a more certain and durable character than they are, from the nature of that Society, who are not bound to keep the child longer than they think fit. The general principle, that the considerations of the pecuniary benefit of a child should not be acted upon in case of a proceeding by *habeas corpus*, is recognised by Lord Eldon, in the case of *Lyons v. Blenkin* (a), where, upon a *habeas corpus* obtained by the father for the custody of his children, Lord Eldon directed a petition to be filed in Chancery, for the purpose of enabling him to act in a manner different from what he should upon a *habeas corpus*. In the *Anonymous case* (b) already mentioned, upon a similar application by a father for a *habeas corpus*, Lord Eldon, after stating that a Judge should attend to nothing but cruelty or personal ill-usage to the child, as a ground for taking it from his father, added that he could not, upon a *habeas corpus*, attend to the circumstance that an aunt of the children had made an appointment in their favour which she would not continue if they resided with their father, though, as he said, that circumstance might have some weight in a Chancery cause. In the case of *Ex parte Skinner* (c), already mentioned, though the father was in gaol for debt, the Court refused the application of the wife for the custody of the child, and left it with the father. In *Ex parte Knee* (d), the custody even of an infant illegitimate child was given to the mother, though it appeared that, from her situation in life, the child would not be so advantageously brought up by her as under the care of the father: and Mansfield, C. J., stated that it was not unlikely that, by granting the application, the Court might be doing a great prejudice to the child, but that still the mother was entitled to the child, if she insisted upon it. And in the case of *In re Pulbrook* (e), above also mentioned, though the father, who applied, by *habeas corpus*, for the custody of his child, was in a state of utter destitution, without a house or regular business, and unable to provide fit

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(a) Jac. 254, 255.

(b) Jac. 254 n.

(c) 9 B. Moore, 279.

(d) 1 N. R. 148.

(e) 11 Jur. 185.

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education for the child, and though the wife's father, viz. she and the child then lived, was able and willing to maintain and educate the child, yet Erle, J., held that neither the desire of the child's father, nor the other circumstances in that case (as I have already stated), afforded sufficient ground for depriving the child's father of his legal right to the custody of the child. It could only be done upon the proof of gross misconduct on the part. I think it clearly follows, from these several authorities, the poverty of Mrs. Moore, her want of means for the maintenance and education of her son, her acquiescence in the arrangements made by her with the Society in 1852, and the inexpediency (as regards the interests of the child) of rescinding those arrangements, are not sufficient grounds for a Court of Law refusing her present application. The decision in *Sett's case* (a) has been relied on by Mr. O'Meara's Counsel, opposed to those authorities. In that case, Lord Mansfield (in refusing the application of a father for the custody of his child, six years old, who was then living with the mother) relied on the bankruptcy of the father, and his inability to contribute to the support of the child, as one of the grounds of the refusal. But this was not the sole ground of the decision. It also appeared that the mother had been obliged to separate from the father, in consequence of his ill-treatment; and that the child was not well used by the father, and was likely to receive an improper education from him. And Lord Mansfield, in his judgment, states the impropriety of the father's conduct, as well as his poverty, as the ground of the refusal. That case was decided at a period when the distinctions established by so many subsequent cases, between the principles on which the Courts of Law and the Court of Chancery act in respect of custody of children, were not sufficiently attended to. The authority of that case appears to have been doubted by the Court of Common Pleas, and by Mr. Justice Patteson, in the case of *Ex parte Dwyer* (b), *Ex parte McClellan* (c), and is at variance with others to which I have referred; and it cannot, consistently with

(a) Lloft. 748.

(b) 9 B. Moore, 278.

(c) 1 Dowl. P. C. 85.

ough the other cases, be now contended that a Court of Law should act upon
s able and *Blissett's case*, by holding that parents forfeit their right to the
old that custody and control of their children, because disabled by poverty
circumstances from providing fitting support and education for them.

efficient ground. The remaining ground of objection to Mrs. Moore's application,
the custody which has been relied on in the argument, though not put forward
of ground by affidavit, is, that the application is not made by her *bona fide*,
these grounds but for the illegal purpose of enabling her to bring up the child in
want of means her own religion (the Roman Catholic); whereas the child should,
on, her according to the general principle of our law, be brought up in the
e Society religion of his father, who was a Protestant. This was the question
is of the principally discussed in *Alicia Race's case* (a), where the facts were
efficient ground nearly similar. In that case, the deceased father, not having
n. The appointed any guardian, the mother, claiming as guardian for nurture,
Mr. O'Connell applied on *habeas corpus*, in 1857, for the custody of her
se, Lord E. daughter, about nine or ten years of age, who had been placed by
custody of her, in 1855, with the Patriotic Commissioners. The mother was a
the mother Catholic, and the deceased father was a Protestant; and, in 1855,
lity to her the Commissioners, with the mother's concurrence, had sent the
the mother child to a Protestant school. The principal ground upon which the
also applied mother's application was opposed was, that it was made for the
father's improper purpose of bringing up the child in a religion different
not was from that of the father. It was not denied that the mother intended
education to bring up the child as a Roman Catholic; but the Court of Queen's
improper Bench in England unanimously granted the application. The judg-
said to ment of the Court, pronounced by Lord Campbell in that case, is so
inclination decisive upon the question, that it is unnecessary to refer to any
improper other authority. The case is mentioned and acquiesced in by *Lord*
in respect *St. Leonards*, in the treatise to which I have already referred (b);
a. The and I do not understand upon what ground we are called on to
out to doubt its authority. Upon an application, on *habeas corpus*, by a
Ex parte guardian for nurture, for the custody of a child, a Court of Law
the cannot enter into the question of what was the religion of the
it deceased father, or in what religion the mother intended to educate
the child. It is for the Court of Chancery alone to enter into that

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(a) 7 El. & Bl. 186.

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(b) Handy Book, 182.

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question. That Court alone has the jurisdiction and the power to direct the religious education of the child, and to control parental rights, where the assertion of them would interfere with such direction; but Courts of Law do not claim, and could not exercise, that power. In *Alicia Race's case*, Lord Campbell states (p. 202) that the mother, having survived the father, had, in all respects, the same parental authority which might have been exercised by the father, had he survived the mother; that the question must be the same as if the father had died a Roman Catholic, and the surviving mother had been a Protestant; and he asks, "Would it, in that case, be unlawful for the mother to have brought up the children as Protestants?" He also states that no sufficient authority was cited to show that it was the duty of the mother, as guardian for nurture, from the simple fact of the father being a Protestant, to educate the child as a Protestant; and, after referring to a decision of Vice-Chancellor Knight Bruce, in a case in Chancery, that children should be educated in the religion of their father, Lord Campbell (p. 203) states his opinion that such doctrine only applied to the education of wards of the Court of Chancery, where an Equity Judge, representing the Queen as *parens patriæ*, had a large discretion, and might give directions beyond the scope of the duties of a guardian for nurture, under the Common Law. And he further stated that Vice-Chancellor Knight Bruce's decision did not show that the mother, as guardian for nurture, was *legally* bound to educate the child as a Protestant, or could be charged with an illegal purpose, when intending to send the child to a Roman Catholic school. The child was, accordingly, ordered to be delivered up to the mother. That *Case of Alicia Race* is, therefore, an express authority to show that Mrs. Moore's intention to bring up her son as a Catholic, though his father was a Protestant, is no ground for a Court of Law to refuse her the custody of her son; and the subsequent proceedings, with respect to that child, further illustrate the distinction I have already observed on between the principles of the Courts of Law and the Court of Chancery, with respect to children; because it appears, by a note to the report of the case in 26 *Law Jour.*, *Q. B.*, p. 176, that the child, having been made a ward of Chancery after the order of the Queen's

Bench, was directed by Vice-Chancellor Kindersley to be brought up in the religion of her father. E. T. 1859.
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For these several reasons, therefore, I am clearly of opinion that, sitting here in a Court of Law, we are not warranted in refusing this writ of *habeas corpus*, upon any of the grounds of objection relied upon; and that, accordingly, Mrs. Moore's application for that writ should be complied with.

PERRIN, J.

I concur in the opinion of my Brother O'BRIEN, and in the view of this case which he has so fairly and clearly expressed. I consider myself bound by the weight of authority, which ranges from the 7 *Edw.* 4 down to the *Case of Alicia Race*, in which, by the elaborate judgment of the Court of Queen's Bench, at Westminster, pronounced by Lord Campbell, the difficult question now before us is decided. I shall not, therefore, consume time by reiterating the arguments of my Brother O'BRIEN, but shall merely state that I concur with him.

LEFROY, C. J.

I do not feel it at all necessary to offer any justification for the difference of opinion that exists between myself and my two Brethren who have spoken last; nor, in support of my own opinion, to go back to the reign of Edward the Fourth; nor to follow my Brother O'BRIEN through the numerous authorities from that time to the present, which have been so industriously and carefully collected and commented on by him: because I feel myself not only justified, but called upon, to differ from them both, upon the authority of the case (a) to which they have both referred, which is not only the leading, but also the latest, case upon the question now before us. I must first, however, take leave to observe as to one topic adverted to by my Brother O'BRIEN, namely, the object of the party who has applied for this writ of *habeas corpus*, with reference to the future religious education of this child. I certainly am not aware that this topic had been introduced into the argument at the Bar, and, indeed,

(a) *Regina v. Clarke (Alicia Race's case)*, 7 El. & Bl. 186.

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the introduction of such a topic would have been totally irrelevant, according to the opinion of Lord Eldon, in one of those cases, which came before him as a Common Law Judge, when presiding over the Court of Common Pleas, in which he observes, "With the question of religion we have nothing whatsoever to do." But to return. I have already said, that I do not mean to go beyond the authority of *Alicia Race's case*; a case which, in my opinion, ought to bind us all, as the unanimous judgment of the Court of Queen's Bench in England, upon a full review of the prior decisions. For myself, I am happy to find that I have such a substantial ground upon which to take my stand on a question which involves not merely matter of law, but also, in a certain sense, the exercise of the discretionary power of the Court. In that case, the law is thus laid down by Lord Campbell (a):—"For these reasons, and upon these authorities, we are of opinion, in the present case, that *prima facie* the mother is entitled, as guardian for nurture, to have her child delivered over to her. Still she may have forfeited her right by prior immoral conduct; by proof that she does not make the application *bona fide*, or by having some illegal act in view when she has obtained possession of the child." This is the law, with the exceptions engrafted upon it, as laid down by Lord Campbell in that case. The *prima facie* right may be forfeited by prior immorality, by want of *bona fides* in the application, or by an illegal purpose or object in obtaining possession of the child. If that case be an authority conclusive and binding upon us, as to the *prima facie* right of the guardian to have the child delivered over to her, so it must be equally conclusive and binding upon us as to what will cause a forfeiture of that *prima facie* right. I cannot so read a case in which the principle of the law is laid down, with its exceptions, as to adopt the principle and reject the exceptions; so did not Lord Campbell; for he then proceeds to examine and consider the facts of the case before him, not merely in reference to the rule, but also to the exceptions; and, accordingly, he observes:—"But here no immorality whatever is imputed to Mrs. Race; and she seems to have been a virtuous woman, well deserv-

(a) 7 El. & Bl. 200.

“ ing the ardent affection which her husband felt for her.” Now I shall apply to the case before me a test precisely similar to that applied by Lord Campbell to *Alicia Race's case*. Is there any prior immorality on the part of this applicant, or is this a *bona fide* application? I have read the affidavits, and also the document upon the legal effect and operation of which so much time and learning have been unnecessarily consumed—I mean the document by which she obtained admission for her child to the Orphan Society. I admit it is perfectly clear that this is not a stipulation that can transfer the guardianship, or be a legal bar to the present claim. In this I entirely concur with Lord Campbell. Indeed it did not require any authority to establish the proposition that a guardianship cannot be assigned; it is a personal trust, which cannot be made over to another. But still that document is a very important element in this case. But before I allude further to it, I must call attention to the case upon which this woman comes before the Court, according to her own affidavit. She states that she is, and always has been, a Roman Catholic; that her children have been so; that her object in seeking possession of this child is a conscientious one; that this application is *bona fide* such as she alleges. Now let us see what credit can possibly be given to any statement resting only on her own assertions. It appears by evidence which cannot be questioned, that when she went into the poor-house with this child she registered herself and the child as Protestants; that she had another child born in the poor-house, which she had baptised and registered as a Protestant. Then comes the document under which she obtained admission for her child to the Orphan Society, signed by her deliberately, by which she represents herself and her child to be then, and always having been, Protestants. But further; by the rules of that Society it appears that this document must be signed by six subscribers, attesting their belief of the truth of the statement. She accordingly obtains the signatures of these six persons, upon the faith of her statement made to each and every one of them, which, according to her present affidavit, must have been a deceit and falsehood upon these six occasions. But further; it appears also by the rules of the Society, that this document must also be attested by

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the minister or curate of the parish to which the applicant belongs. She, accordingly, obtains the signature of the minister of the parish, to vouch this matter, and give it further credence. Now what had occurred to justify the clergyman in attaching his signature to that document? She had gone into his church; she had presented her child at the font to be baptised as a Protestant, she herself vouching for that child, and necessarily obtaining sponsors for that child, in accordance with the requirements of the baptismal service of the Protestant church. In that service the question is asked:—"Hath this child been already baptised or no?" Upon that solemn occasion she declared that it had not been baptised before; and yet now in her affidavit she swears, that not only this child but her other children had been previously baptised in the Roman Catholic church of that very parish. This, I admit, does not amount to perjury punishable by law, but it is a solemn declaration made in the presence of Him to whom we appeal upon oath, to witness to the truth of our assertions. Is that declaration less solemn than if it had been made under the form of oath administered in Courts of Justice? That document, so deliberately concocted, is afterwards presented by her to the Society, accompanied by the declaration that she and her child were then, and had always been, Protestants—well knowing that the funds of the institution were exclusively appropriated to such objects, and by these means obtained the admission of this child, which has, since the year 1852, with her concurrence, continued to obtain the benefit of those funds; and no ground of complaint whatsoever in reference to the treatment of the child is stated, or even surmised. Well then, I would ask, a tissue of deliberate falsehood, fraud and imposition of this kind (which I cannot reprobate more strongly than my Brother O'BRIEN has done), does it or does it not amount to prior immorality on the part of this woman? If it does, what becomes of that case upon the authority of which this Court is called upon to give up the child to the custody of this woman? Can it be said here, as Lord Campbell said in that case, "Here no immorality whatever is imputed to this woman, and she seems to be a virtuous woman, well deserving the ardent affection her husband felt for her?" Is she well deserving to have trans-

ferred to her, by the act of this Court, for nurture and education, the care and custody of this child? Something has been suggested as to this being what may be considered as a "by-gone immorality." But when Lord Campbell spoke of prior immorality, he does not appear to have thought that, in order to deprive the guardian of the assistance of this Court in obtaining possession of her child, she must be found wallowing in repeated immorality, up to the moment at which the child is to be put into her hands to be contaminated. As to the other ground of disqualification, Lord Campbell, in a farther part of his judgment (a), says:—"An attempt is made to show that in applying for this writ she is a mere tool in the hands of others. But on carefully looking through the affidavits, we do not see that this charge is at all substantiated, and we think that we are bound to give credit to what she swears, as to purity and sincerity of her motives." But what credit is this woman entitled to, merely on the ground that she swears as to the purity and sincerity of her motives? Has anything been suggested to lead us to think that the change which has come over her judgment, as to what she felt in 1852, to be the best way of discharging her duty to her child, is conscientious and *bona fide*? Is any reason suggested for her now desiring to take this child out of that position in which it is clothed, fed, housed, educated and hereafter to be apprenticed? She does not venture to swear that she has means of providing for it in any respect; on the contrary, she is just come out of the poor-house, and, for aught that appears, she and her child must go back to the poor-house; but she says, that if she gets possession of this child she will have means, but does not say what security she has for their continuance. I admit this may not be an absolute ground for rejecting her claim, but it fortifies strongly the want of *bona fides* in the application. I perfectly concur in the observation of my Brother O'BRIEN, that a guardian for nurture may change his mind, and resume the custody of his ward; and, in this case, although this woman may have thought, in 1852, that this was a good provision for her child, yet she may see reason to change her mind; and if there was no reason to doubt as to its being the *bona fide* reason

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(a) 7 EL. & BL. 200, 201; S. C., 3 Jur., N. S., 338.

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of her calling for the possession of her child, this Court should not refuse to assist her. But what reason has been here suggested, or is there, for believing that this is not a pretence to cover a secret purpose of delivering over the child to other custody? an object for which, neither directly nor indirectly, this Court will suffer its jurisdiction to be abused. Upon the question of *bona fides* in the application, the want of any reason for changing the deliberate judgments he formed in 1852, as to the conscientious discharge of her duty towards this child, the observations of Lord Cottenham are very important, as well as his decision in the case of *Talbot v. The Earl of Shrewsbury* (a):—"As to that" (the child being left in the custody of the mother), "the testamentary guardian, Mr. Doyle, "thinks that there should be an alteration; but I have a right to "look at the opinions of that gentleman himself; for I know that "when he first took upon himself to interfere, he did not think it "necessary to take the child out of the mother's care. If, therefore, he was of that opinion in September, I must assume that he "saw nothing in the religious education or care of the child which "was a reason for interfering. I think, therefore, that, under the "present circumstances, the removal of the child is not expedient." The child was accordingly left with her mother. Under all the circumstances of this case, therefore, I am of opinion to refuse this application; and I feel myself bound to do so upon the principle that, when I find a general rule of law laid down, to which is attached a qualification, I am as much bound by that qualification as I am by the general rule. Lord Campbell then having laid it down in the case referred to, with the assent of the whole Court, that the right of the guardian to nurture may be forfeited by prior immorality, or by the application to the Court not being *bona fide*, and considering this case to come within the principle of these exceptions, my opinion is what I have stated. The result is, as the Court is divided, the order must be, "No rule" on the motion.

(a) 4 My. & Cr. 672, 684.

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ROWLAND v. PERSSE.

(*Common Pleas.*)

Jan. 31.
 May 1, 8.

THIS was an action for breaking and entering the plaintiff's lands, and depriving him of the possession thereof, and of the crops thereon.

The defendant pleaded that he was landlord of the plaintiff, as to the lands in question, and that, as such landlord, he had instituted proceedings by civil-bill against the plaintiff, for the recovery of said lands, before the Assistant Barrister of the county of Galway, having jurisdiction to hear and determine such civil-bill ejectment; that the Assistant Barrister duly entertained and heard said ejectment, and pronounced a decree in favour of the defendant, under which he took possession.

The only issue was, whether the defence was true in substance and fact?

This case was tried at the last Galway Summer Assizes, before Mr. Baron Greene; and the defendant (upon whom it lay to prove the issue) gave evidence that he had been the plaintiff's landlord of the premises upon which the alleged trespass had been committed, named Chapelfield; that he had taken proceedings by civil-bill to recover possession of them, and that he had obtained a decree and issued execution thereon.

R., being tenant to P. of Blackacre, under a lease for lives, made an exchange, and received from P., in lieu thereof, a portion of Whiteacre; a memorandum in writing, but not under seal, having been signed by P., by which he agreed that R. should hold Whiteacre during the same term for which Blackacre was held under the lease. P. subsequently brought a civil bill ejectment for Whiteacre, and obtained a decree; and having taken possession under it, R. brought an action against him for taking possession

of the lands; and the sole question for trial was, whether the Assistant Barrister, upon whose decree P. relied, had jurisdiction to hear and determine the case, it being proved at the trial of the action, that the last *cestui que vie* in the lease, who was proved, at the trial of the civil-bill, to have been absent in America for thirty years (and whose death was, therefore, presumed, under the 7 W. 3, c. 8), was actually still alive.—*Held*, that inasmuch as Whiteacre was held under a mere parol agreement, the estate of R. therein could be no more than a tenancy from year to year, and that there was, therefore, nothing to show that the proceedings before the Assistant Barrister were *coram non Judice*.

Quære—Whether if Whiteacre had been held under the lease, the subsequent production of the *cestui que vie* would oust the Assistant Barrister's jurisdiction, under the 72nd section of 14 & 15 Vic., c. 57.

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The plaintiff Thomas Rowland then proceeded to prove his case, which was as follows:—That he had held certain lands called Kilcreest, of the defendant Dudley Persse, under a lease which had been made in the year 1816, by Robert Persse to James Hardman Burke, Mary Rowland and James Rowland, for the life of James Rowland; that he, the plaintiff, was in possession of the lands in the year 1847, under that lease, when he made an exchange with the defendant, and gave up Kilcreest to him, and received in lieu of it the farm of Chapelfield, which he held until 1856; a memorandum in writing, but not under seal, having been signed by the defendant, by which he agreed that the plaintiff should hold the lands of Chapelfield for the term during which he held the lands of Kilcreest under the lease of 1816. It was then proved that evidence had been given at the trial of the civil-bill ejectment, that James Rowland, the *cestui que vie* in the lease of 1816, had gone to America, and had not been heard of for thirty years: and James Rowland was then produced and identified as the *cestui que vie* in the lease.

Counsel for the defendant then referred to the 72nd section of the Civil-bill Act (14 & 15 Vic., c. 57), and contended that, there being an averment in the defence that the Assistant Barrister had jurisdiction to entertain and determine the civil-bill ejectment, and that being a mixed question of law and fact, the fact that James Rowland was alive at the time ousted the jurisdiction of the Assistant Barrister, upon the authority of *Betty v. Nail* (a), and *Coneys v. Coneys* (b).

The learned Judge refused to direct a verdict, but left the question of the amount of damages (supposing the plaintiff entitled) to the jury, reserving leave, by consent of the parties, to the defendant's Counsel, to have the verdict changed into a verdict for the defendant, in case the Court above should be of opinion that the fact of the existence of the *cestui que vie* James Rowland, at the time of the issuing of the civil-bill process and the making of the decree, did not oust the jurisdiction of the Assistant Barrister; as in such

(a) 6 Ir. Com. Law Rep. 17.

(b) 8 Ir. Com. Law Rep. 379.

case the decree by him would bar the plaintiff's right to recover in the present action. E. T. 1860.
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The pleadings and evidence will appear more fully stated in the judgment of the Court.

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A conditional order was obtained, and cause shown; and the case stood over for re-argument.

P. Blake and *Beytagh* showed cause.

G. Fitzgibbon and *M. Morris*, contra, in support of the conditional order.

The following cases were cited :—*Coneys v. Coneys* (a); *Govern v. Rowland* (b); *Betty v. Nail* (c); *Moore v. O'Donnell* (d); *Gilman v. Croly* (e); 8 & 9 *Vic.*, c. 106, s. 3; 14 & 15 *Vic.*, c. 57, s. 52; 7 *W.* 3, c. 8.

Cur. ad. vult.

MONAHAN, C. J., delivered the judgment of the Court.

This case comes before the Court upon a motion to enter a verdict for the defendant, in pursuance of leave reserved at the trial, which took place before Mr. Baron Greene, at the last Galway Summer Assizes. May 8.

It is rather difficult to ascertain, from the pleadings, what the form or nature of the action is; whether, what, under the old form would be considered trespass, or case. The summons and plaint states that the plaintiff was, in the year 1847, in possession of and entitled to a certain interest in the lands of Kilcreest, consisting of five acres or thereabouts, situated in the county of Galway, under a lease thereof still subsisting, and made in the year 1816; and that the reversion expectant on the determination of that lease was, in the year 1847, vested in the defendant; that the defendant was anxious to obtain immediate possession of these five acres, and accordingly proposed to the plaintiff to give him, in exchange for

(a) 8 *Ir. Com. Law Rep.* 379.

(b) 7 *Ir. Com. Law Rep.* 218; in *Error*, 619.

(c) 6 *Ir. Com. Law Rep.* 17.

(d) 6 *Ir. Com. Law Rep.* 46.

(e) 7 *Ir. Com. Law Rep.* 557.

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them, a piece of land, of equal value, called the Chapelfield; and the plaintiff having acceded to the proposal, the following agreement, in writing, was prepared and signed by the defendant:—"I promise and agree to give Thomas Rowland the Chapelfield, and that he shall hold it, and be entitled to it, for, and during the same tenure that he is entitled to the land now in his possession, which will be ascertained when the validity of the lease he now holds under is tried and decided on, and I promise to sign the articles of agreement when prepared by Mr. Walsh; this agreement to hold good until then.—DUDLEY PERSE."

The object of this agreement appears to have been, that Rowland the plaintiff was to hold the land called Chapelfield, in lieu of, and for the same time that it should turn out he was entitled to, the lands of Kilcreest. The summons and plaint then states that, in pursuance of this agreement, the plaintiff gave up possession of Kilcreest to the defendant, on the 23rd of November 1847, and in return was put by him into actual possession of the Chapelfield; that the parties continued in possession of these respective lands until the year 1856, when the defendant "wrongfully and injuriously alleged that the surviving life in the said lease of the 1st of November 1816 had expired, and that said lease was therefore determined, and, thereupon, wrongfully and injuriously brought his ejectment by civil-bill, in the Court of the then Assistant Barrister for the county of Galway, in which the lands were situated, for recovery of said Chapelfield, as upon a tenancy which had expired by the death of the *cestui que vie* in said lease of, &c., and wrongfully and injuriously obtained a decree therein for delivering to him of the possession of said Chapelfield:" and that the defendant took possession under the decree, and converted to his own use certain crops of hay, oats and potatoes then on the lands. The summons and plaint then avers that, in point of fact, the lease of 1816 had not expired, but, on the contrary, that James Rowland, one of the *cestui que vies* therein, was, at the time of the eviction, and still is, alive, and that, therefore, the plaintiff was, at that time, fully entitled to the possession of the Chapelfield, and of the crops thereon. To this summons and plaint the defendant has pleaded

only one defence; in which he states that he, as landlord of the lands of Chapelfield, instituted proceedings against the plaintiff by civil-bill ejectment, for recovery of the possession of said lands, before H. H. Hamilton, Esq., Assistant Barrister of the County of Galway, and “*having jurisdiction* to hear and determine said civil-bill ejectment;” and that at the hearing of the ejectment, at the Loughrea Sessions, in the month of June 1856, the Assistant Barrister duly entertained and heard said civil-bill ejectment, in the presence of the plaintiff, and thereupon duly pronounced a decree in favour of the defendant, under which the latter took possession of the lands and crops thereon, as he was lawfully entitled to do. No question was raised as to the validity of this defence in point of law; and, therefore, when the issues came to be settled, the only one settled or agreed on was, whether this defence was true in substance and fact. It appears, from the report of the learned Judge who tried the case, that the defendant proved the fact of tenancy, and gave secondary evidence of the Assistant Barrister’s decree, the document having been lost; and it was also proved that evidence was given, before the Assistant Barrister, that James Rowland, the surviving *cestui que vie* in the lease of 1816, had gone to America, and had not been heard of for thirty years; and that the Assistant Barrister made a decree accordingly, in favour of the present defendant. It was then proved, at the trial, that James Rowland was alive, and actually in Court; and an objection was then raised, on behalf of the plaintiff, to this effect: that inasmuch as the defence contained an averment that the Assistant Barrister had jurisdiction to hear and determine the civil-bill ejectment, and inasmuch as it was necessary to establish the truth of that averment, in order to sustain the defence, that, as it involved a mixed question of law and fact, and the evidence established that the *cestui que vie* was still alive, therefore the Assistant Barrister had no jurisdiction to entertain and determine the case. This objection, which was founded upon the construction of the 72nd section of the Civil-bill Act (14 & 15 Vic., c. 57), simply amounted to this, that the fact of one of the *cestui que vies* in the lease of 1816 being alive deprived the Assistant Barrister of jurisdiction to adjudicate in an ejectment brought to defeat that lease,

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and, there being no jurisdiction, that the proceedings were *coram non Judice*; for it was not contended by the plaintiff's Counsel that, if the Assistant Barrister had jurisdiction, and had made his decree, whether that decree were right or wrong, that a person acting under that decree would be a trespasser. This is the only question now before us; and, in support of the plaintiff's objection, we have been referred to the 72nd section of the Civil-bill Act; and the portion of that section upon which he relies is as follows:—

"In all cases where any lands, tenements or hereditaments shall have been held by any tenant at a rent not exceeding £50 per annum, and the tenant's interest in the same shall have determined, and after demand made by the landlord or lessor, his agent, bailiff or receiver, and delivery of possession of the same shall be withheld, it shall and may be lawful for the said landlord or lessor to proceed by civil-bill ejectment against such tenant." The section then provides for service of the civil-bill process, and empowers the Assistant Barrister, upon proof of service of the civil-bill, of the rent being under £50 per annum, of the determination of the tenant's interest, and of notice to quit (when necessary), to make a decree for the landlord. It has been argued that this section gives jurisdiction to the Assistant Barrister only in cases where the relation of landlord and tenant subsists, where the rent reserved is under £50 a-year, and where the tenant's interest shall have determined; and it was then contended that the interest of the tenant subsisted during the life of James Rowland; and his life not having ended, that the Assistant Barrister had no jurisdiction to hear and determine the case. In support of this argument, we have been referred to the case of *Coneys v. Coneys* (a), decided in this Court. But the distinction between *Coneys v. Coneys* and the present case is this, that in that case the relation of landlord and tenant *did not in fact exist at all* between the parties, the yearly sum payable to the party who instituted the ejectment proceedings being merely a *rentcharge*, and not a rent service. In the judgment which I delivered on that occasion, and in which the other Members of the Court concurred, I stated the reasons why we were of opinion

(a) 8 Ir. Com. Law Rep. 379.

that the relation of landlord and tenant did not exist in that case, and that therefore the Assistant Barrister had no jurisdiction; and I used these words (p. 393):—"In conclusion, therefore, we are of opinion "that the jurisdiction of the Assistant Barrister is, according to the "express provisions of the Act, confined to cases between landlord "and tenant, and that, though the Assistant Barrister must necessarily inquire whether the relation of landlord and tenant exists, "yet this is merely a preliminary inquiry, to enable him to know "whether he will judicially entertain the case; and that there is "nothing in the Act, expressly or by necessary implication, rendering the determination of the Assistant Barrister in this preliminary "matter binding on the parties; and, therefore, that it was competent for the plaintiffs, in the proceedings before us, to show, as "they have done, that such relation did not in fact exist, and that "the proceedings were *coram non Judice*." If it had been necessary in that case for us to consider whether it was necessary that the holding should be at a yearly rent under £50 a-year, it is probable that we should also have held that not only the existence of the relation of landlord and tenant, but also a holding at a rent under £50 a-year, was necessary, in order to give the Assistant Barrister jurisdiction. But we did not decide, in that case, upon the construction of this statute, that when the relation of landlord and tenant existed, and when the amount of rent was within the necessary limit to give the Assistant Barrister jurisdiction, that his jurisdiction would have ceased to exist, if the question in dispute was whether or not the tenancy had terminated. If that were so, such a case as this, might arise. In an ejectment, before the Assistant Barrister, notice to quit might be proved, and his decree made thereupon; but, in subsequent proceedings in the Superior Courts, it might be impossible to prove the notice to quit; and a question would then arise, whether or not the proceedings before the Assistant Barrister were *coram non Judice*, by reason of that failure of proof, and could be got rid of by a cross-ejectment. If it were necessary to decide whether the determination of the lease was requisite, in order to give jurisdiction to the Assistant Barrister, it would be for us carefully to consider that question, and the

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inconvenience to which such a doctrine would lead. But it is not necessary to do so in this case; the facts of this case being, that an agreement in writing, but not under seal, is set forth in the pleadings. This cannot, of itself, convey or create a legal estate in the lands to which it relates, nor confer any legal title, the estate being of a freehold nature, which, therefore, cannot be granted by parol nor by any instrument not under seal; and, in addition to this well-known rule of law, we have the enactment of a recent statute, which provides that every lease required to be in writing must be under seal. Therefore, it is clear that the tenure in this case could have amounted to no more than a tenancy from year to year created, not by any instrument, but by the mutual acts and dealings of the parties. The case, therefore, resolves itself into this—a tenancy from year to year existed; an ejectment is brought on the alleged determination of that tenancy. No objection is made that the determination of that tenancy was not proved before the Assistant-Barrister. If such an objection had been raised before him no doubt he would have disposed of it, by requiring proof of the service of a notice to quit; and, if such had been required, for all we know to the contrary, it might have been given. Here, there was a tenancy from year to year. There may have existed such an interest as could, under the provisions of the Civil-bill Act, have entitled the tenant to rely upon an equitable defence to the ejectment. But how was this equitable defence to be sustained in evidence? The *cestui que vie* was absent in America, and had not been heard of for upwards of seven years; and, under the provisions of 7 W. 3, c. 8, if an ejectment had been brought, as on the determination of the lease, proof of the absence of the *cestui que vie* from the United Kingdom, and of his not having been heard of for upwards of seven years, would have been conclusive evidence of the termination of the lease. If this be so, in an action of ejectment between landlord and tenant, upon the alleged determination of the lease, it must also be evidence in case of an equitable defence set up by the tenant, in support of a tenancy from year to year.

We, therefore, have no doubt that, in this case, the Assistant

Barrister jurisdiction; and, as this was the only objection taken at the trial, we are of opinion that the defence is true in substance and fact. Our order, therefore, shall be, that the verdict be entered for the defendant.

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Rule accordingly.

KELLY v. WEBBER.

May 4, 5.

THIS was an action for the conversion of a quantity of wheat, oats and potatoes, the property of the plaintiff. The summons and plaint also contained a count in detinue. The defendant denied that the goods in question were the goods of the plaintiff. At the trial, before MONAHAN, C. J., at the Sittings after last Hilary Term, it appeared that plaintiff was tenant to the defendant, of the lands of Drimroe in the Queen's County, under a lease dated 10th of March 1825, for the life of John Kelly and Colonel Anthony Weldon, who, having been the survivor of the lives, died on the 21st of December 1858. Prior to the termination of the lease, the tenant had sown a crop of wheat, and afterwards was evicted by a civil-bill ejectment, founded upon the determination of the tenant's interest. The oats and potatoes were sown, after the demand of possession, on the 31st of December 1858. There were two abortive proceedings, in ejectment, before the defendant succeeded in evicting the plaintiff. After his entry under the civil-bill decree, obtained 9th of June 1859, the defendant cut the wheat and oats, and dug the potatoes; and defendant's Counsel submitted that, on the execution of the decree and by virtue of the proceedings, they became his property. The LORD CHIEF JUSTICE directed the jury to find for the plaintiff for the value of the wheat, holding that it was the plaintiff's property; but

A tenant who held under a lease *pur autre vie* had, prior to the termination thereof by the death of the last surviving *cestui qui vie*, sowed a crop of wheat, and subsequently thereto, and, after demand of possession by the landlord, sowed some oats and potatoes. He was afterwards evicted under a civil-bill decree, in an ejectment founded upon the determination of the tenant's interest. The landlord, after getting into possession, cut and dug the respective crops.—*Held*, in an action of trover, by the outgoing tenant against the landlord, that

he was entitled to recover the value of the wheat, but not of the oats and potatoes. *Held also*, that the rights of the tenant in respect of the crops were not affected by the proceedings in the ejectment.

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reserved leave for defendant to move to set aside the verdict, and have one entered for him, in case the Court should be of opinion that he ought not to have so directed. A conditional order was accordingly obtained, in the following Term, to enter up a verdict for the defendant, pursuant to leave reserved.

J. C. Coffey (with whom was *William Allen*) showed cause against making absolute the said order.

The tenant sowed the wheat during the continuance of the lease. The duration of his interest depending upon an uncertain event namely, the life of the *cestui qui vie*, he was entitled to claim as emblements the crops growing at the time of the death. The tenant, by defending the ejectment, committed no act of forfeiture; and though he might be liable to mesne rates, he did not lose his right to the emblements. He cited 9 *Vin. Ab.*, tit. *Emblements*, pp. 366-9; *Bro. Ab.*, fol. 260; 1 *Furlong's Land. and Tenant*, p. 630; *Cunningham v. Uniacks* (a); *Doe v. Witherwick* (b); *Boraston v. Green* (c); *Year Book*, 36 *H. 6*, pl. 6.

Rollestone and *Levinge*, contra, contended that the plaintiff became, by his overholding, a disseisor, and incurred a forfeiture of the emblements. They cited *Bro. Ab.*, tit. *Emblements*, fol. 260, pl. 8, 9; 25 *Year Book*, 19 *H. 6*, 45, 46; *Bac. Ab.*, *Assise*, p. 331; 9 *Vin. Ab.*, *Disseisin*, p. 94; 9 *Vin. Ab.*, *Emblements*, p. 369, pl. 42; 3 *Bl. Com.*, pp. 173, 206; *Year Book*, 19 *H. 6*, pl. 46; *Year Book*, 16 *H. 6*, pl. 46; *Roscoe on Real Actions*, p. 481; *Tomline's Law Dictionary*, "*Deforciant*;" 2 *Furlong's Land. and Tenant*, p. 1074; *Adams on Ejectment*, p. 304; *Hodgson v. Gascoigne* (d); *Fitzgerald v. O'Connell* (e); *Shenton v. Corbally* (f).

Allen, in reply.

MONAHAN, C. J., delivered the judgment of the Court.

May 5.

This case, which has been argued with considerable ability, was

(a) *Arm., Mac. & Ogle*, 395.

(b) 10 *B. Moo.* 267; *S. C.*, 2 *Bing.* 11.

(c) 16 *East*, 71.

(d) 5 *B. & Ald.* 88.

(e) 1 *J. & L.* 136.

(f) 1 *Hog.* 403.

allowed to stand, for the purpose of looking into the authorities. The facts, which are simple, are as follows :—The plaintiff, Patrick Kelly, held some few acres of land under an old lease for one or more lives, subject to a nominal rent of one shilling per annum, his father and grandfather having held under the same lease previously. Mr. Webber, the defendant, purchased the estate, comprising the demised premises, in the Landed Estates Court, some time since, subject to this lease, which was a freehold lease, and terminated upon the 21st of December 1858, upon the death of Anthony Weldon, the surviving *cestui qui vie*.

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The plaintiff had been in possession for several years, and the rent, being of very small amount, had not been demanded of him ; his title, however, to the demised land was under the lease, and under it alone. In October 1858, he sowed a crop of wheat ; in December of the same year the lease expired, and the landlord, having demanded possession, brought a civil-bill ejectment, in March or April 1859. It also appears that, after the death of the *cestui qui vie*, but before the ejectment was brought, the plaintiff had planted a crop of potatoes and oats. The ejectment having come on for hearing before the Assistant Barrister, the tenant, by reason of some inability on the part of the landlord to prove the lease, obtained a dismissal without prejudice. The landlord brought a second civil-bill ejectment, with a similar result ; and it was not until he had brought the third civil-bill ejectment that he succeeded in obtaining a decree, as against an overholding tenant. In the month of July following, the landlord executed the decree for possession, obtained in the Civil-bill Court, under which he took possession of the land and crops, cutting and severing the wheat, oats and potatoes. The tenant demanded the crops ; but the landlord, being under the impression that he was not entitled to them, refused to part with them ; and the tenant brought an action, which, under the old system, would have been considered an action of trover, for the value of the entire crops, wheat, oats, and potatoes, and it came on for trial before me in the Sittings after last Term. At the trial, I stated my opinion to be, that the plaintiff was not entitled to the crops sown after the determination of his

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tenancy, although he might have sown them under the impression that the tenancy was, at the time, subsisting, for that he was bound to know when his tenancy terminated. I was also of opinion that, according to the law of emblements, he was entitled to the crop of wheat, sown in the lifetime of the last *cestui qui vie*.

It was argued, and with considerable ability, by Mr. *Levinge*, that although Kelly might have been entitled to the wheat crop, if he had given up possession to his landlord, upon the determination of his lease, yet, that having put the landlord to his ejection, and his landlord having recovered the possession under an ejection, rendered necessary by the act of the tenant, that the latter thereby deprived himself of all right to the crop of wheat. I was referred to some recent cases, *Doe. d. Upton v. Witherwick* (a), and *Hodgson v. Gascoyne* (b), in support of that proposition; but I did not conceive that those authorities established the proposition contended for—that because a tenant misconducted himself, by refusing to give up possession at the determination of his tenancy, that thereby he divested himself of his right to the crop, which he would otherwise have been entitled to; and I therefore directed the jury to find for the plaintiff, as to the value of the wheat crop, sown during the lifetime of the *cestui qui vie*; and although I did not entertain a favourable view of the landlord's claim, I nevertheless reserved leave for him to apply to the Court to have the verdict entered for him if I should have so directed. The case now comes before us accordingly, and has been very fully discussed. We have been referred to several authorities from the *Year Books*, *Viner* and *Brook*; and, no doubt, in them this proposition is laid down, that if a person recover land sown with crops, in an *action of assize*, he shall also recover the emblements; and Mr. *Levinge* in his argument pressed upon us that this was a general proposition, and applied to the present case. We cannot, however, yield to this argument, as we do not conceive that the proposition laid down in these authorities applies to the present case; and we are of opinion that it only applies to a case where an action is brought to evict the tenant, founded upon the

(a) 2 Bing. 11.

(b) 5 B. & Ald. 88.

landlord's title, that title being proved to have existed in the landlord at the time the tenant sowed the crop. E. T. 1860.
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There is no doubt that, when an ejectment is brought, upon the death of the *cestui qui vie*, all crops sown by the tenant after that period become the property of the landlord; and upon the authorities cited during the argument, upon the subject of assize and deforcement, I conceive that we are bound to hold that those cases only decided that the landlord was entitled to crops sown after deforcement; and I therefore asked for authority to establish what I conceived to be quite a different proposition, viz., that a tenant forfeited his right to crops sown by him before the termination of his lease, upon the death of the *cestui qui vie*, by the mere act of overholding.

Upon looking over the old authorities, I have discovered a passage in *Vin. Abr., Emblements*, 34, in which the law is laid down upon this subject, as I conceive it to exist. It is as follows;—"If *baron*, seised *in jure uxoris*, or a man seised for term *de auter vie*, sows the land, and the *feme* dies, or *cestui qui vie* dies, he in reversion, or the heir, enters, and he who sows re-ousts him, and the other brought assise, and recovered his damages, yet he who sowed shall have the crop, for the other has recovered damages which suffices for the tort." *Brook's Ab., Emblements*, pl. 16, 46, *Ass. 2*. There is also another passage in sec. 27, which appears to apply to the cases cited by Mr. *Levinge*: "If a villein leases his lands, and the lessee sows the land, and dies, and the lord of the villein enters, he shall have the emblements. The reason seems to be, inasmuch as the lord enters by *title*; for he who recovers land, or enters by title, shall have the emblements." We cannot hold, therefore, that a tenant, holding over after the death of the *cestui qui vie*, thereby forfeits his right to the crop sown during the subsistence of his tenancy. The landlord's recovering in an ejectment entitles him to the crop only in the case where his title is antecedent to the sowing of the crop, as in the case of the crops of potatoes and oats in the present case, or in the case where the tenant, by committing waste, or doing some such act, forfeits his term; in which case, the landlord, by entering for the forfeiture, is in as of his

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former estate, and becomes entitled to the crops sown before the forfeiture, the forfeiture being the tenant's own act. On the whole, therefore, we are clearly of opinion, that my direction at the trial was right, and that the plaintiff is entitled to retain his verdict, and must have the costs of this motion. We do not, however, regret that the case has arisen for judicial consideration, as there are some loose passages in some modern text-books, very much calculated to mislead on the subject.

Cause shown allowed with costs.

M. T. 1860.
Nov. 12.

COMERFORD v. DALY.

Where the plaintiff obtains leave to change his own venue, the defendant will be entitled to costs of the motion.

M. MORRIS moved, on the part of the plaintiff, for liberty to change the venue from the county of Galway to the county of the city of Dublin. The ground, stated in the affidavit, for making the application was, that the venue had been laid in Galway, in consequence of instructions to that effect having been sent by mistake by the plaintiff's attorney to his town agent. The action was against the maker of a promissory note, and the defence merely denied the making of the note. The affidavit was also made to *merita*, and that a consent had been tendered to defendant.

Concannon, for defendant, *contra*, contended that no sufficient ground had been laid for changing the venue. At all events the defendant was entitled to the costs of the motion. He cited *Hewitt v. Hewitt* (a); *Frazer v. Edwards* (b).

Morris replied.

MONAHAN, C. J.

For myself, I entertain some doubts whether costs should be given. However, the general opinion of the Court is, that the defendant should have the costs, as the plaintiff is in fact seeking to amend his own mistake.

Motion granted; the defendant to have £3 costs.

(a) 3 Ir. Com. Law Rep. 222.

(b) 5 Ir. Com. Law Rep. 540.

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Cychequer Chamber.

(Error from the Common Pleas.)

LITTLE and another, in Error, v. WINGFIELD and others.*

June 1, 2, 3, 4,
 6, 17.

THIS was a writ of error, brought to reverse the judgment of the Court of Common Pleas upon the argument of the bill of exceptions (reported *ante*, vol. 8, p. 279), whereby a *venire de novo* was awarded in favour of the defendants. The facts and evidence are there stated at considerable length, so far as necessary to illustrate the arguments of Counsel and judgment of the Court. The following is a complete summary of the documentary evidence adduced at both sides. The plaintiffs read the following documents, viz. :—

Inquisition dated 22nd of September 1609, 7 *Jac.* 1, finding “ That
 “ the high sea, or Great Irish Ocean, so called, passes through and
 “ flows into the river Moy aforesaid, in the county (Mayo) aforesaid,
 “ from the north towards the south, as far as the ford of the Abbey
 “ of Ardnaree, and from thence again re-flows ; and that there yearly,
 “ and at certain times of the year, salmon and herrings and other
 “ kinds of fish are taken ; and that within the said space of the flow
 “ and re-flow of the sea aforesaid the fisheries from thence altogether
 “ belong and appertain and ought to belong and appertain to our Lord
 “ the King, his heirs and successors, as in right of his Crown of his
 “ kingdom of Ireland, and are of the yearly value in all issues, besides
 “ all reprises, of 26s. 8d.”

Letters patent, dated 26th of June 1611, 9 *Jac.* 1, granting to

A several fishery in the river M., having become re-vested in the Crown, was in 1669 re-granted in fee-simple to Sir G. P., whose representatives, afterwards, in 1788, demised the same to a party through whom the plaintiffs claimed. The defendants, at the trial of an action for the disturbance of the plaintiffs in the exclusive enjoyment of said right, having given some evidence of adverse user by them of a fishery within a portion of that claimed by the plaintiffs, at a certain spot in the M., opposite to the lands of S., for upwards of sixty years :—

Held (RICH-

ARDS, B., *dissentiente*), affirming the judgment of the Court of Common Pleas, that the jury were at liberty to presume a sub-grant by the owners of the original fishery to parties under whom the principal defendant derived.

* *Coram* LEFROY, C. J. ; FIGOT, C. B. ; PERRIN, O'BRIEN and HAYES, JJ. ; RICHARDS and GREENE, BB.—PERRIN, J., did not deliver judgment.

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Nicholas Lord Delvin, *inter alia*, "the entire of the fishery, fishing and
" taking of salmon and other kinds of fish of the bay, creek, river and
" water of Moy in the county of Mayo, within our province of Con-
" naught, within the entire space of the ebbing and flowing of the sea
" and sea water in the bay, &c., aforesaid, extending from the Great
" Irish Ocean from the north, southwards as far as the ford of the
" Abbey of Ardnaree, and thence re-flowing as far as the Irish Ocean
" aforesaid, to hold in common socage at a rent of £5. 15s."

Letters patent, 15th of June 1613, 11 *Jac.* 1, re-granting same
to Henry Piers, Esq., at a like rent.

Sundry attested copies of extracts from Crown rentals, showing
that said fishery had been put in charge, and entries thereon of pay-
ments of rent in the years 1612, 1613, 1615, 1622, 1624, 1627,
1637, 1639, 1641; and showing that Lord Delvin was tenant of the
Moy fishery in 1612; that Piers was tenant in 1613, and that John
Dowd was tenant in the subsequent years above named, including
the year 1641.

Decree of the Court of Claims, 16th of July 1666, in favour of
Sir G. Preston.

Letters patent, 27th July 1661, 13 *Car.* 2, granting "all and sin-
gular fishings in the sea, in and belonging to Connaught," to Sir
George Preston, his heirs and assigns, for ever.

Letters patent, 29th of May 1669, 21 *Car.* 2, reciting patent
13 *Car.* 2, aforesaid; sections of Acts of Settlement and Explanation;
that as to some of the fishings in the former patent contained, Sir
G. Preston had been disappointed thereof, by decrees made in the
Court of Claims, and for want of more particular expressions than
were in said former grant contained; reciting also the grant by the
general words of "all and singular the fishings in the sea in and
belonging to Connaught;" that it was intended to make the former
grant more effectual; grant "all that salmon fishing, pike, eel, and
other fishing of and in the river Moyne in the county of Sligo,
in that province, saving always, to all and every person and persons
who have had any decree from the late Commissioners of the Court
of Claims in Ireland, of the premises, or any part thereof, the full
benefit of their respective decrees.

Letters patent, 23rd of May 1684, 36 *Car.* 2, granting fisheries in the Moyne to J. Browne, reserving the right of Sir G. Preston. T. T 1859.
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A deed of assignment, dated 17th of December 1678, from Viscount Granard and Lieutenant-Colonel Hamilton to Sir Arthur Gore, with a memorandum of delivery of possession of the said fishery indorsed thereon. **LITTLE**
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Attested copies of recoveries suffered by Sir Arthur Gore and his descendant, the Earl of Arran, in 1730, 1782, 1809 and 1810.

Marriage settlement of Sir A. Gore, dated in 1730.

Marriage settlement of eldest son of Sir Arthur Gore, dated in 1760.

Deed, dated in 1784, whereby the then Earl of Arran conveyed his estates to trustees, including the fishery in question.

Private Act of Parliament, passed 1785.

Deeds of conveyance, dated respectively 27th and 28th of May 1788.

Lease, dated 25th of October 1788, from Cuffe, a trustee of Lord Arran, to Messrs. Jones and Lindsay, of the fishery in question, "from the ford of the castle of Belleek to the sea," for 1000 years, at £250 a-year.

Sundry documents to prove pedigree of the Arran family.

Decree of the Court of Chancery, dated 1810.

Re-conveyance, dated 20th of January 1821, in pursuance of said decree, by Cuffe to the Earl of Arran, of "all the fishings of the Moy, and all the creeks, &c., thereunto belonging, from the ford at the castle of Belleek to the sea," subject to said lease.

Payment of rent by plaintiffs to Lord Arran.

Decree of Court of Claims, dated in 1668, in favour of Lewis Wingfield; whereby it was declared that the lands of Scurmore, amongst others, had been seized, &c., by reason, &c., of the late horrid rebellion, and thereby forfeited to His Majesty; and that said lands allotted to the said Lewis Wingfield or those under whom he claimed, for their services as soldiers, were, upon the 7th day of May 1659, in the actual seisin, possession and occupation of the said Lewis Wingfield, or those under whom he claimed, his or their

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lessees or undertenants; and said John Wingfield was declared entitled to several denominations of land, and, amongst others, the said lands of Scurmore, "together with all and singular castles, houses, &c., &c., weirs, fishings, fences, &c., &c., and appurtenances to the premises, or any part thereof, belonging or appertaining, and therewith usually held, occupied, possessed and enjoyed."

Letters patent, dated 1670, pursuant to said decree, granting to Lewis Wingfield, *inter alia*, said lands of Scurmore, "together with all and singular castles, messuages, &c., waters, watercourses, fishings, weirs, &c., and all and singular other profits, commodities, rights, privileges, advantages, emoluments and hereditaments to the said premises, or any part or parts thereof, belonging, or appertaining."

The will of Lewis Wingfield, dated 2nd of September 1673.

Marriage settlement of Richard Wingfield, dated in 1721.

Memorials of two leases of said lands of Scurmore, dated respectively 11th and 12th of March 1752, from Lord Powerscourt to Annealey Gore and another, which did not expire until 1818.

A sub-lease from said Gore to Nesbitt, of the lands of Scurmore.

An extract from the Book of Survey and Distributions, showing that, in 1641, the owner of Scurmore, therein called Skermore, 65A. 12., county of Sligo, barony of Tiveragh, parish of Castlecommon, was William Lynch (described as an "Irish Papist"), and that same, with other lands, had been given to Lewis Wingfield.

The defendants gave in evidence the following documents, viz:—

The said decree of the Court of Claims, of 1668.

The said patent of 1670.

Copy of the will of Lord Powerscourt, the father of the defendant, dated in 1788, whereby he devised to his third son Edward (the defendant) all his estates in the counties of Sligo and Mayo, in the following terms, viz:—"And as to my said estates, manor lands and premises, situate in the said counties of Sligo and Mayo, from and immediately after my decease, to the use and behoof of my third son, the said E. Wingfield, and his assigns, for and during the term of his natural life, without impeachment of waste."

The rental of the defendant's Sligo estates, showing the rents

received by defendant for the fishery at Scurmore, for several half years from 1819 to 1837. T. T. 1859.
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Attested copy of judgment obtained by the defendant against Thomas Fawcett, in the Queen's Bench, Easter Term 1836, in an action of trespass for breaking and entering the several fishery of the said Colonel Edward Wingfield, in a certain river called Scurmore, in the barony of Tiveragh and county of Sligo. LITTLE
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The purport of the parol evidence is already stated in the report of the proceedings in the Common Pleas. The following were the grounds of error relied on by the plaintiffs in error:—

1. That the second exception should not have been allowed; but, on the contrary, ought to have been overruled.

2. That a *venire de novo* ought not to have been awarded; but, on the contrary, that judgment ought to have been entered up for the plaintiffs, without regard to said exceptions, or any of them.

3. That the plaintiffs having established by the patents, deeds and other evidence, a title to the fishery in the pleadings in this cause mentioned; and the *locus in qua*, as appears by the finding of said jury, being within the limits of the said fishery, the learned Judge was not at liberty to leave, and acted correctly in not leaving it, to the jury to presume any grant, as against such title so deduced and proved by the plaintiffs.

4. That no sufficient grounds are laid, or appear upon said bill of exceptions, wherefore the learned Judge at the trial should have left to the jury any such question as is suggested by said second exception.

5. That it appears by said foregoing record that said learned Judge did, in fact, leave to the jury every question which, upon the pleadings, issues and evidence in this cause, he was bound to submit to them.

Brewster and *Beytagh*, for the plaintiffs in error.

Fitzgibbon and *Carleton*, for the defendants in error.

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The following cases were cited in the arguments of Counsel:—
Duke of Somerset v. Fogwell (a); *Bird v. Higginson* (b); *Fitz-*

(a) 5 B. & C. 875.

(b) 2 Ad. & El. 696.

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waller's case (a); *Carter v. Murcot* (b); *Bagot v. Orr* (c); *The Mayor of Hull v. Horner* (d); 2 *Wms. Saund.* p. 175, c; *Eldridge v. Knott* (e); *Bright v. Walker* (f); *Livitt v. Wilson* (g); *Doe v. Read* (h); *Doe v. Cooke* (i); *Attorney-General v. Exelme Hospital* (k); *Blewitt v. Tregonning* (l); *Gabbett v. Clancy* (m); *Hopkins v. Robinson* (n); *Barlow v. Rhodes* (o); *Manuel v. Fisher* (p); *Holcroft v. Hele* (q); *Campbell v. Wilson* (r); *Lord Hale's "De Jure Maris,"* p. 26; *Calmady v. Roe* (s); *Lopez v. Andrew* (t); *Vooght v. Wiuch* (u); *Starkie on Evidence*, p. 904; *Williams v. Wilcox* (v); *Roe v. Ireland* (w); 1 *Taylor on Evidence*, p. 130; *Duke of Devonshire v. Hodnett* (x); *Doe v. Ireland* (y); *Doe v. Millett* (z); *Day v. Williams* (aa); *Gray v. Bond* (bb); *Keen v. Deardon* (cc); *Doe v. Wright* (dd); *Doe v. Scott* (ee); *Jones v. Chapman* (ff); 2 *Rolls Abr.*, p. 186; *Holford v. Bailey* (gg).

Cur. ad. vult.

HAYES, J.

June 17.

In this case the action was brought to recover damages for a trespass committed on the 1st of May 1853, upon the plaintiff's several fishery in the river Moy, in that part situate between the ford of the castle of Belleek and the sea, at a place called Scur-

(a) 1 Mod. 105.

(b) 4 Burr. 2662.

(c) 2 B. & Pul. 472.

(d) Cow. 102.

(e) Cow. 214.

(f) 1 Cr., M. & R. 211.

(g) 3 Bing. 115; S. C., 10 B. M. 439.

(h) 5 B. & Al. 232.

(i) 6 Bing. 179.

(k) 17 Beav. 366.

(l) 3 Ad. & Ell. 554.

(m) 8 Ir. Law Rep. 299.

(n) 2 Lev. 2.

(o) 3 Tyr. 280.

(p) 5 Jur., N. S., 389.

(q) 1 B. & Pul. 400.

(r) 3 East, 294.

(s) 6 C. B. 861.

(t) 3 M. & Ry. 329, n.

(u) 2 B. & Ad. 662.

(v) 8 Ell. & Bl. 314.

(w) 11 East, 280.

(x) 1 Hud. & Bro. 322.

(y) 11 East, 294.

(z) 11 Q. B. 1036.

(aa) 1 Cr. & Jer. 460.

(bb) 2 Bro. & Bing. 667.

(cc) 8 East, 267.

(dd) 2 B. & A. 710-20.

(ee) 11 East, 483.

(ff) 2 Exch. 803.

(gg) 8 Q. B. 1000; S. C., in Error, 13 Q. B. 426.

more, in the county of Sligo. The defences to which it is now material to call attention are, the first, by which the defendant alleges that the plaintiff had not, at the time in question, a several fishery in the said river, and at the said place; and the fourth, by which the defendant alleges that the fishery in the said part of the said river Moy now is, and at the time in question was, the several fishery of the defendant. Upon these defences two issues have been raised, viz., first, whether the plaintiffs, on the 1st of May 1833, or at any time since, had a several fishery in the Moy at Scurmore? Secondly; whether the fishery was, at the several times when, &c., the fishery of the defendant, Edward Wingfield?

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Upon the trial, which took place before Mr. Justice PERRIN, at the Summer Assizes 1857, the plaintiff proceeded to prove his title to the fishery, which title embraced not only the point in question, but also the whole navigable river from Belleek to the sea. A large body of documentary and parol evidence was produced for this purpose, to which I shall advert as briefly as possible. After proving the inquisition that ascertained the right of the Crown to the fishery, the plaintiff gave in evidence a patent of the fishery, of the 26th of June (9 *Jac.* 1), to Lord Delvin, to hold for ever, at a rent of £5. 15s. 0d. The language of this instrument is very large, and would seem of itself quite sufficient to vest in the patentee the exclusive right of fishing in the river up to Belleek, and including the place in question. A patent, in still larger terms, was afterwards, and as of the 15th of June (11 *Jac.* 1), granted by the Crown to Henry Piers, to whom, it would appear, Lord Delvin had in the meantime assigned his interest. This property, described in the patent as situate in said counties of Mayo and Sligo, and for which the reserved rent had been regularly paid, having become forfeited in the great rebellion, a patent grant in fee was made to Sir George Preston, dated the 27th of July 1661, and a further patent of the 29th of May 1669. By the former of these grants a rent of £5 was reserved. It was very large in its terms; but, to remove some doubts which had arisen upon its construction, the second patent was passed. No reasonable doubt can be entertained that the words of these patents are large enough to carry

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the fishing of the whole navigable stream, including Scurmore to Preston. Being thus entitled, he, on the 2nd of February 1673 conveyed his estate to Sir Arthur Forbes (afterwards Lord Granard) and Lieutenant-Colonel William Hamilton; and, on the 17th of December 1675, Lord Granard and Colonel Hamilton conveyed their estate and interest to Sir Arthur Gore. On this deed of 1675 there was an indorsement that full possession had been given of the whole fishery in the Moy to the grantee. It appears that, about the year 1684, some conflict of right, as to this Moy fishery, took place between Preston and a person named Brown, who had also a grant from the Crown of certain fisheries. The matter ended, however, by a confirmation of the Preston title, and a grant to Brown, saving the rights of Preston. The Gore title was then traced down to the year 1730, when a settlement of the estates was made, upon the marriage of the then owner, and two recoveries suffered, as for property in Mayo and Sligo, to complete it. Again, in 1762, another settlement was executed, recoveries having been previously suffered; and the then tenant for life, the first Lord Arran, having died, the second Earl and his son joined in suffering recoveries in Michaelmas Term 1782; and the estates were then, by a deed of 1784, and a Private Act of Parliament of 1785, vested in trustees, for sale, for payment of debts. On the 25th of October 1788, a lease of the fishery was made by a purchaser under the trustees, to persons named Jones and Lindsay, for one thousand years, at a rent of £250 per annum. This purchase was afterwards set aside in Chancery, and a re-conveyance to the Arran family decreed, without prejudice, however, to the lease that had been made, and the rent reserved by which has been paid to the Arran family to the present time. In the year 1810, recoveries were again suffered, and the property re-settled. When the plaintiff had progressed so far in proof of his title, and was about to trace his own title as deriving under the thousand years' lease, the defendant's Counsel, in answer to an inquiry of the learned Judge, intimated that the sufficiency of the plaintiff's title was not in controversy, and, for the purposes of the trial, waived all objection to it, as derived from the lease of 1788 by assignment.

The plaintiff's Counsel then proceeded to give evidence of the title of the defendants, with a view to show that no sea fishery had ever been granted to them. This title commenced with a decree of the Court of Claims, in 1668, followed by a patent grant to Lewis Wingfield, of the 29th of June 1670, the year after the second patent to Preston. By these instruments the lands of Scurmore were granted, with all waters, fishings, weirs and appurtenances to the said lands belonging.

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The title of the patentee was then traced down to Lord Powerscourt, who, on the 25th of March 1752, demised to Annesley Gore the lands of Scurmore, to hold for three lives, with a limited covenant for renewal. This lease expired in 1818. No mention was made in it of any fishery. In 1754, Annesley Gore sub-demised the lands of Scurmore to Charles Nesbitt. This sub-lease expired in 1808. The defendant, Colonel Wingfield, claimed as devisee of the lands of Scurmore, under the will of Richard, the third Lord Powerscourt, bearing date the 3rd of August 1788, and by whom, and his devisee, the rent reserved in the lease of 1752 was regularly received. On its expiration in 1818, he entered into actual possession of Scurmore.

A considerable body of parol testimony was produced on the part of the plaintiff, to show a possession of the fishery in the navigable river, from Belleek to the sea, going along with the title, evidenced by fishing even opposite Scurmore-house; while, on the part of the defendants, several witnesses were examined, to prove the exercise of a right of fishing during a long series of years, and as long as living memory extended, by the persons holding Scurmore lands for the time being, in the river Moy, opposite Scurmore-house, and in the river Delvin, which flows into the Moy in the same immediate neighbourhood. Evidence was given that a certain restricted right of fishing with a stake-net, extending from the land to a certain point towards the thread of the river, was exercised openly; that it was acquiesced in by the owners of the great fishery held by the plaintiff; and that the produce was openly sold to fish dealers resorting to the neighbourhood to effect their purchases.

The learned Judge, in his charge, told the jury that the patent

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to Preston was sufficient to convey the whole fishing of the entire river from Belleek to the sea; and that, after that patent, there remained nothing in the Crown in the way of a fishery there, which it could grant to L. Wingfield. That there was no actual grant of the fishery at Scurmore proved by the defendants, and that he saw no title to the fishery in the defendants, although there was very considerable evidence of an exercise of the power of fishing; but that the evidence would not, in his Lordship's opinion, warrant the jury in finding a grant from the Crown of a several fishery, or in finding that Colonel Wingfield was entitled to a several fishery. His Lordship left it to the jury to decide whether the fishing place at Scurmore was included in the grant to Preston; and, if so, he told them to find for the plaintiffs.

To this charge and direction the defendants excepted, and called on his Lordship to inform the jury that, if they believed that the right of fishing had been uninterruptedly, continuously and adversely exercised by the defendant, Colonel Wingfield, and those deriving under him, for above twenty years before the commencement of the suit, and as far back as the memory of the witnesses extended, the jury, in such case, might presume a grant of such fishery, as was so exercised, from the Crown, or from some person having power and right to make such grant. Other exceptions were taken; but, as they have been abandoned by the defendant's Counsel, it is only material to call attention to the one I have read.

The learned Judge having declined so to inform the jury, it is now for this Court to determine whether he was warranted in so doing.

On the part of the plaintiff it has been contended that, as the patent to Sir George Preston plainly and clearly conveyed the whole several fishery in the entire river, from Belleek to the sea, including Scurmore; and, as title had been clearly deduced from Sir George Preston down to the plaintiff, as deriving under the lease of 1788, it would not have been competent for the learned Judge, in opposition to, and in derogation of, a proved title, to send to the jury to presume a grant from the Crown, or any other person; the more especially as the patent deeds given in evidence, as constituting the

defendants' muniments of title, absolutely negative the grant of a several fishery at Scurmore. In support of this argument several cases have been cited, and, among others, the case of *Doe d. Hammond v. Cooke* (a), decided by the Court of Common Pleas, when presided over by a very learned and eminent Judge, Lord Chief Justice Tindal. His Lordship is there reported as saying that no case can be found in which any presumption has been made, except where a title has been shown by the "party who calls for the "presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form." As applied to the particular case with reference to which that language was used, the expressions need not be much cavilled at; for certainly a mere wrong-doer (as the defendant was in that action of ejectment) had no right to call on the Court to leave to the jury a question of presumption of an outstanding term, to defeat the otherwise good title of the plaintiff. But, if we are to regard this as a general enunciation of the principles which should guide and govern Judges in administering that very important branch of the law, I must beg leave to say that I think it far too narrow; that it applies merely to that class of presumptions which are based upon duty, and that I cannot bring my mind to concur in it, as a correct exposition and limitation of the nature and extent of the doctrine. The law of presumption is applicable not merely to the supplying of formal defects (for then it would be of comparatively little importance in our system of jurisprudence), but it is used, so far as title to real property is concerned, and with which alone we have now to do, for the purpose and from a principle of quieting possession, as has been said by Lord Mansfield in *Eldridge v. Knott* (b); and hence it is that, when a person is shown for a series of years to have been in the undisputed enjoyment of property, or of any of its rights, incidents or immunities, exercising the rights of property and performing its duties, as it is not easy to believe that a person would thus be left by the true owner long and freely to enjoy what was not his own, a jury will be allowed to presume a grant, a surrender, a release, or even a grant from the Crown, if

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(a) 6 Bing. 174.
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necessary, as the most natural mode of accounting for the state of things which is found to exist. "A presumption of any fact," said Lord Tenterden, in *Rex v. Burdett* (a), "is properly an inferring that fact, from other facts that are known; it is an act of reasoning; and much of human knowledge, on all subjects, is derived from this source." Accordingly, in cases of old possession, long acquiesced in, the deed may be presumed and inferred, as a real and probable means of accounting for the state of things which is proved to exist; but this, of course, ought only to be done in those cases in which a deed might in fact have been executed. But it is said, on the part of the plaintiff, that no presumption ought to be made against a proved title. Now if a party, being competent to grant, did in fact make a grant, and, after the making of such grant, were to proceed to deal with the property, on the face of his title-deeds, as if no such grant had been made, and then, upon the grant being lost, were to insist that such grant could never have had existence, and ought not to be presumed, because it would be in contravention of the title which he was ready to prove in himself by the title-deeds,—this would appear to me to be very like the manufacture of evidence by a party, for his own purposes; and yet I see no real distinction between that and what is insisted on in this case for the plaintiff. On the other hand, we have the evidence of an exercise of this right of fishing, restricted in its limits as it was, but still going back for a long period of time; the fishing carried on under the eyes of those who were directly interested in opposing and putting an end to it, if founded on usurpation; the profits of the great fishery openly and continuously interfered with, and the means of paying the considerable rent that was received thus seriously diminished, and all without expostulation or remonstrance. In my opinion, these were matters which well deserved to have been submitted to a jury, in order that they might exercise their reasoning powers upon them, and infer, if they felt warranted in so doing, that some grant had been made, at some antecedent period, by some person capable of making a grant, to some person capable of receiving the grant, and which, if made, would account for and legalise what otherwise must be found to commence and be based in trespass and aggression.

(a) 4 B. & Ald. 95, 161.

It has been hinted in the course of this argument (and cases have been cited as in support of the doctrine), that, as these presumptions are made to quiet long possessions, juries ought to be advised, as they have been advised, to find the fact without inquiry. I cannot subscribe to that doctrine; and if the practice has at all prevailed of *directing* juries to presume a fact, it ought to be confined within the narrowest possible limits; suffice it to say that, in my judgment, this was not such a case, but it was a case in which the jury would have been bound to consider *all the circumstances* presented to them, and, with the assistance of the presiding Judge, to bring their minds to a conviction of the fact, whether a deed had or had not been executed. The case of *Gray v. Bond* (a) has been cited as justifying the mode of exception adopted here; but I may observe, first, that was not a case of a bill of exceptions, it was merely a case reserved for the opinion of the Court. Secondly, it was not a case in which a title to an hereditament was in question, but merely the right to an easement affecting the hereditament. Thirdly, that no objection was made as to the general form in which the learned Judge left the matter to the jury. Fourthly, the question there was not as to any particular grant at any particular time, but whether any grant at all had been made; for the grant, or even the acquiescence, of the reversion during the existence of the tenancy would have been sufficient to defeat him when defending an action on the case for disturbance of the easement after twenty years' enjoyment. Hence it is, that though I think that case very valuable as an exposition of the general law of presumption, I regard it as no authority upon the form of the bill of exceptions. Being, however, of opinion that there was a very serious question, which, in order to do full justice between the parties, ought to have been submitted to the jury, and was not, I am very unwilling that the cause of substantial justice should be impeded by forms. I cannot but say that I by no means approve of the form in which this exception has been taken. I should have been much better pleased if the exception had pointed more precisely to the deed, which the defendant called upon the jury to find by their verdict, as the instrument which gave him title to the

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fishery. I do not mean that he should have affixed to it a precise date, but I think it would not have been too much to ask that he should have done at the trial what his Counsel has done in the course of the argument, viz., select some one or more stages or periods when it would have been not only possible, but probable, that a deed might have been executed. If this had been done, the Judge would have been better able to bring the subject before the jury, and to comment on the circumstances which then existed, and which rendered the execution of the instrument more or less probable; for it is to be borne in mind that mere length of possession is not the only matter which is to be taken into consideration upon a question of presumption, as it generally is in a question of statutory limitation. But, as I have said, I am very unwilling that a matter of form, even though it may in some degree wear the character of substance also, should stand in the way of a re-investigation of this case, and thus conclude it against the defendant for ever. I am, therefore, of opinion, though not without some hesitation, that there ought to be a *venire de novo*, and that the judgment of the Common Pleas should be affirmed.

O'BRIEN, J.

I am also of opinion that the judgment of the Court of Common Pleas, allowing the second exception, should be affirmed, and accordingly that a *venire de novo* should be awarded.

It appears, by the bill of exceptions, that the learned Judge before whom the case was tried told the jury (amongst other things), that the inquiry which they had to make was, what was the extent of the fishery granted by the Crown, by the patents, to Sir George Preston (under whom plaintiffs claimed); and that with respect to the several fishery claimed by defendant in Scurmore, no actual grant of it was proved by defendant; that he saw no title in that fishery in defendant, even if such several fishery ever existed; and that there was nothing to warrant the jury in finding that defendant had a title to said several fishery; that the question was, whether the fishing place at Scurmore, which was in dispute, was one of the fishing places included in the grant to Sir George Preston,

by said patent, of the fishery of the river Moy; and that, if they were of that opinion, they should find a verdict for the plaintiff. By the second exception, defendant's Counsel required the learned Judge to tell the jury, "that if they believed that the right of fishing (at Scurmore) had been uninterruptedly, continuously and adversely exercised by defendant, and those claiming under him, for above twenty years before the commencement of this suit, and as far back as the memory of the witnesses examined in the case extended, as stated by them in their evidence, then that the jury, in such case, might presume a grant of such fishery as was exercised, from the Crown, or from some person having power or right to make such grant." The learned Judge refused to give this direction to the jury, and adhered to his charge. The first question which arises on this exception is, whether the evidence at the trial, relied on by the defendant, was sufficient to warrant the jury (if they believed it) to come to the conclusion that there was that uninterrupted, continuous and adverse exercise of the right of fishing at Scurmore, by the defendant, and those claiming under him; on the supposition of which the defendant's Counsel required the question of the presumption of a grant to be left to the jury. It is not necessary for me to go in detail through the evidence given by defendant at the trial, as to the actual exercise of this right of fishing; it is referred to, at some length, in the judgment of the Court of Common Pleas, in this case (a). There was some contradictory evidence given by the plaintiff on this point, which was, of course, for the consideration of the jury; but it appears to me that the evidence given by the defendant himself, and some of the witnesses examined for him, was clearly sufficient to warrant the jury (if they believed it), notwithstanding the contradictory evidence given by the plaintiff, to come to the conclusion that the defendant, and those claiming under him, had, for a much longer period than twenty years before the commencement of this suit, uninterruptedly, continuously and adversely exercised the right of fishing at Scurmore, which is now in dispute. Upon this point there is, I believe, no difference of opinion among the several Members of the Court.

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(a) 8 Ir. Com. Law Rep. 287.

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The next matter for consideration is, whether, assuming the fact of such uninterrupted, continuous and adverse exercise of the right of fishing at Scurmore to have been established to the satisfaction of the jury, the defendant was entitled to have the question of the presumption of a grant of such fishery left to the jury. There is no doubt of the general principle, that the fact of an exclusive possession for over twenty years, and the uninterrupted enjoyment, during that period, of an incorporeal hereditament, though not amounting to a conclusive establishment of the right and title to such hereditament, or to a positive bar of any adverse claim, may (if the origin of such possession and enjoyment be not otherwise accounted for) be left to a jury, as a ground for presuming that such enjoyment was had, and such right exercised, under a grant by deed or patent, even without any direct evidence having been given that such grant or patent ever existed. In the case of land, twenty years' possession would, as a general rule, operate, under the Statute of Limitations, as a positive bar to any adverse claims, and give a title to the party in possession. That statute did not apply to a several fishery, or to other incorporeal hereditaments; but Courts of Law, with respect to incorporeal hereditaments generally, have acted by analogy to the statute, and, for the purpose of quieting possession, have held, as a general rule, that where the origin of the enjoyment and user of an incorporeal right, for such period, has not been otherwise accounted for, such enjoyment and user should be attributed to a legal origin, and to a rightful title; and that, accordingly, the existence of a grant, by deed or patent, which alone could give that legal origin and title, may be presumed by a jury, though no direct evidence has been given of the existence. The principles of this doctrine are clearly laid down by Lord Mansfield, in the cases of *The Mayor of Hull v. Horner* (a), and of *Eldridge v. Knott* (b), and have been recognised in several other cases cited in the argument. But it is contended, by the plaintiff's Counsel, that this doctrine of presumption should not be acted on with respect to a several fishery in a public navigable river; and that, as such a several fishery is against common right, the title to it should be

(a) Cowper, 109, 110.

(b) Cowper, 215.

strictly proved, and should not be presumed from any length of possession.—[See judgment of Yates, J., in *Carter v. Murcot* (a).]—

In the present case, however, this reasoning does not apply, as the question of the doctrine of presumption being relied on, against the common right of the public, does not arise. The question here is not whether there is a right to a several fishery in the river at Scurmore, to the exclusion of the public. It is clear, upon the evidence, that, long previous to Sir George Preston's patents of 1661 and 1669, the Crown had been entitled to a several fishery in the entire portion of the river Moy, which lies between Belleek Ford (otherwise called the ford of Ardnaree) and the sea, and which includes the part of the river at Scurmore where the right of fishery in dispute is claimed. It is, in fact, the common case of the plaintiffs and defendants, that the Crown had been entitled to a several fishery at Scurmore—the plaintiffs claim it as part of the several fishery, which had been granted by those patents, and which subsequently became vested in the Arran family, under whom plaintiffs derive; and the question is not as to the existence of a several fishery at Scurmore, to the exclusion of the public, but whether the plaintiffs or defendants are entitled to it. It may be that this doctrine of presumption should not be relied on for the purpose of proving the *existence* of a right to a several fishery, in a tidal navigable river, to the exclusion of the common right of the public; but if it be proved that the right to such several fishery had existed in the Crown, I see no reason why this doctrine should not be acted on by presuming, from length of possession, a grant or assignment of such several fishery by the Crown, or some one deriving under them, as well as in the case of presuming, from length of possession, a grant of any other incorporeal hereditament: the common right of the public is equally excluded, whoever may be the party entitled, under the Crown, to such several fishery.

It is true there are some circumstances in this case which appear inconsistent with the presumption relied on by the defendant, of a grant of a several fishery at Scurmore, such as (amongst others) the omission of any reference to such several fishery in the settlements

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and wills executed by defendant's ancestors, as to the lands of Scurmore; and also in the leases of those lands, executed in 1752, by Lord Powerscourt to Annesley Gore (which expired in 1818), and the under-lease made in 1754, by said Annesley Gore to Nesbit (which expired in 1808), particularly as it is the acts of user and enjoyment by the parties claiming under those two leases which are relied on as some of the grounds for presuming a grant. Plaintiffs' Counsel contend that a grant, subsequent to those leases, to the parties claiming under them, would not have vested the fishery in defendant or his ancestors; and that, from the omission, in those leases, of any reference to the several fishery, it is unlikely that such grant had been previously made. Plaintiffs' Counsel also rely on the descriptions contained in the patents of 1661 and 1669, and in the various deeds and assurances executed by the Arran family and others, under whom plaintiffs claim, of the fisheries thereby respectively conveyed or assured, which comprise the fishery of the entire portion of the river between Belleek ford and the sea, without excepting that part at Scurmore. All these matters were, however, for the consideration of the jury, to whom the question was required by defendants' Counsel to be left, with the direction that they "*might*" (and not that they *must*) presume a grant; and even supposing that the Crown had not, previously to the patents of 1661 and 1669, granted to defendant's ancestor a several fishery in the part of the river at Scurmore, there were several periods subsequent to those patents, during which there were parties competent to make to some of defendant's ancestors, or of those under whom he claims the grant required to be presumed. The learned Judge, however, by his charge as above stated, excluded from the consideration of the jury any question as to the defendant's title, or as to the grant.

We have been also referred to some cases on the authority of which it is contended, that the question which should have been left to the jury was not one of presuming a grant, but whether, *in fact*, a deed or other instrument of grant had been executed. The principal case on this subject is that of *Doe d. Fenwick v. Reed* (a); but in that case the origin of the long-continued possession relied on by the

(a) 5 B. & Ald. 234.

defendant (Reed), as a ground for presuming a conveyance of the estate, was clearly otherwise accounted for. The ancestor of the defendant Reed had originally been put into possession of the lands, under an agreement to hold same until a debt due to him by the then owner of the estate (under whom plaintiff claimed) should be paid off; and the Court held that, as the origin of such possession was accounted for, no presumption could be founded upon the long continuance of that possession after the debt was paid off; but that it was a question of *fact* for the jury, whether such continuance in possession was to be attributed to want of care on the part of those under whom plaintiff claimed, or to the fact of the conveyance of the estate having been executed; and that it was for the jury to say whether, under all the circumstances of the case, a conveyance had actually been executed or not. In the present case, however, it does not appear how the *legal origin* of the long possession and enjoyment of the fishery claimed by the defendant can be accounted for, except on the presumption of a grant. An objection has been also taken to the terms of this exception, on the ground that it does not specify the particular party by whom, or the period of time within which, the grant was to be presumed to have been made; but, in my opinion, it is not necessary, in leaving to a jury the question of a presumption of the grant, to state either the names of the parties by whom, or the time when, such grant should be presumed to have been made. Instances may occur in which an uninterrupted possession and enjoyment of an incorporeal hereditament, for over two hundred years, would be established, without being able to show the period of, or to account for, the commencement or origin of such possession. In such a case the presumption of some grant having been made would be almost conclusive; and yet it may be impossible, from the length of time, to furnish the jury with any materials whatever for deciding at what time, prior to the earliest period when such possession could be proved to have been had, or by what party, such grant might be presumed to have been made. The result of the proposition contended for by plaintiff's Counsel would be that, the greater the length of possession, and the stronger the ground for presuming

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a grant, the greater would be the difficulty of a jury acting on such presumption. All the jurors may be satisfied that there has been a grant executed at *some* antecedent period, by *some* party competent to do so; and yet they may not agree as to the period when or the party by whom, it had been executed. Such a restriction upon this doctrine of presumption would, in many cases, nullify its principles, and defeat the objects for which it was established. Some cases have been cited by plaintiff's Counsel, in which the deed (as to which a question of presumption was required to be left to the jury) was described in the pleadings as having been executed at a specific time, and by certain parties, and in which it was held that the inquiry of the jury should be restricted to that particular deed. See *Blewitt v. Tregonning* (a). In the present case, however, no such restriction is imposed by the pleadings. The defendant claims by his pleading, a several fishery at Scurmore, without stating particularly how that title was originally derived; and he contends that the evidence which he has given at the trial warrants a presumption of a grant of that several fishery to some of his ancestors, which would vest that several fishery in him.

On these several grounds, I am, accordingly, of opinion that the exception should be allowed.

GREENE, B.

Two questions have been argued in this case; first, whether the learned Judge who tried the case should have left any question to the jury; and, secondly, if he ought, whether the exception taken to his charge can be sustained, regard being had to the form of it, and to the specific point which it required to be left to the consideration of the jury.

The action was brought for the disturbance of the plaintiff's several fishery in the river Moy. The real question to be decided at the trial was, whether the defendant, Colonel Wingfield, was entitled, as he alleged he was, to a several fishery in the part of the river Moy, of the fishing in which the plaintiff complains, namely, at a place called Scurmore. The defendant not only denies that the

(a) 3 Ad. & E. 580.

several fishery in that part of the river is the property of the plaintiff, but he goes further, and says that it belongs to him, the defendant.

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The plaintiff deduced a clear title to a several fishery in the Moy, its creeks, bays, &c., between the ford of the castle of Belleek and the sea, within which limits he alleged Scurmore to be. It is found that the place called Scurmore is locally situate within the limits described by the patents under which the plaintiff derives title; and were there no more in the case, the right of the plaintiff would be clear. The defendant gave no direct evidence, such as the plaintiff did, of any grant to himself or to any person through whom he claims, but he adduced evidence of a very long exercise and enjoyment of a right of fishing at two particular parts of Scurmore, by the owners of that denomination of land, and their tenants and servants. Into the particulars of the evidence of this long usage it is not necessary to enter. It is sufficient to say that the evidence went to show a long and repeated exercise of the right, and that right a clearly limited and defined one, to the knowledge of the persons entitled to the several fishery under the Crown, not merely without objection from them, but in some instances with their direct acquiescence and sanction. Upon this evidence, the learned Judge was required to leave to the jury a question whether a grant of the right thus exercised, that is, to the extent of the exercised right, might not be presumed to have been made by the Crown, or some other person competent to make it, so as to give a legal origin and character to the acts done by the defendant and those whom he now represents. The learned Judge declined to submit any such question to the jury, and in effect informed them that, if they believed the *locus in quo* to be within the limits of the several fishery granted by the Crown, in the patents given in evidence for the plaintiff, they ought to find a verdict for the plaintiff—in effect deciding that there was no other question for their consideration. To this the defendant excepted, and the question now is, whether the exception should be allowed?

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It has not been denied that, in support of a long uninterrupted exercise of a right, the origin of which cannot be shown, but which might have had a legal origin, a jury may be told that they are at

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 This is clearly laid down in *The Mayor of Hull v. Horner* (a),
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It was, however, argued in this case that no such presumption can be entertained against a proved right, and that a regular title from the Crown having been deduced to the plaintiff, to the whole of the fishery of the river Moy down to the sea, that right cannot be encountered by any such presumption. However that may be, where the object or purpose of the presumption is to defeat such proved title altogether, the case is different where the existence of the presumed right, and the existence of the presumed fact, are consistent. For instance, in the present case there is no inconsistency in the supposition of an original grant of the whole fishery, and of the title to such fishery being vested in the plaintiff, and yet, also, of a grant from some person through whom that title has been derived, of a limited right to fish, or of a several fishery in some particular part of the river. It appears to me that it is going too far to say that such a grant cannot be legally presumed, as being one not capable of a commencement compatible with the general right. The presumption of such a grant is, no doubt, very different from presumption properly so called, which is a presumption made by the law itself; whereas the existence of a grant, to legalise an usage commenced within time of legal memory, is a matter of fact to be left to a jury, and upon which they are at liberty to exercise their judgment in any manner they may think fit. This distinction is fully established by the cases of *The Mayor of Hull v. Horner* (d), *Doe d. Fenwick v. Read* (e), and other cases. In the present case, evidence was given of a long enjoyment, sufficient, according to the authorities, to warrant a Judge in leaving to a jury as a fact, whether the grant had been or had not been made; that is to say, leaving it to a jury, not merely as a vague presumption, but as a matter upon which they were to arrive at a conclusion, as

(a) Cowp. 102.

(b) 3 M. & Ry. 329, n.

(c) 10 East, 284.

(d) Cowp. 108.

(e) 5 B. & A. 232.

upon any other matter of fact: and this leads to the second point in the present case, which is that upon which I have found the greatest difficulty, namely, as to the form of the exception. The learned Judge was required to submit to the jury this proposition, viz., that if they believed that the right of fishing had been uninterruptedly, continuously and adversely exercised by the defendant, and those deriving under him, for above twenty years before the commencement of this suit, and as far back as the memory of the witnesses examined extends, as stated by them in their evidence, they the jury *may presume a grant of such fishery as was so exercised*, either from the Crown, or from some person having power and right to make such grant. It is said that the defendant's Counsel had no right to insist upon the learned Judge's leaving a question in those terms to the jury; and the argument is based upon two grounds: first, that the so doing would have left the jury at liberty to adopt one part of the alternative, viz., to presume a grant from the Crown, which there could be no ground for presuming against the evidence given in the case; and, secondly, because the question, if submitted in the terms of the exception, might have led to a misconception on the part of the jury, by leaving it open to them to suppose that they might act upon some vague supposition or surmise with respect to a grant, instead of exercising their judgment and discretion as to the actual fact whether a deed or grant had or had not been executed.

Doubtless, the exception might have been more pointed and precise; but I think it substantially embodies what appears to me to have been a tenable demand on the part of the defendant's Counsel. They call upon the Judge to leave to the jury the fact, either that a grant had been made by the Crown, or that it had been made by some other competent authority. Even supposing that, if the exception had been pointed to a grant from the Crown only, and that upon the facts proved that grant could not be presumed (as to which, I consider, it is unnecessary to offer any opinion), yet I think the fair construction of the exception is this, "leave it to the jury to say whether there was a grant from the Crown; or, if you think that cannot be done, then at all events leave to the jury the question of a grant from some other." It would, I think,

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T. T. 1859. have been open to the Judge to adopt the latter part of the alternative. Instead of that, however, he rejects both. I think the learned Judge might properly have told the jury, or the Counsel, that there was no ground for presuming a grant from the Crown, but that there was a question for the jury, as to a grant by some other sufficient grantor. Instead of that, however, the learned Judge declined to leave either branch of inquiry to the jury; and, in that respect, injustice was done to the defendant, if, in point of law, one of the subjects of investigation ought to have been left to the jury. The learned Judge does not object to the question proposed to be submitted to them, on the ground that no foundation for a *portion* of it was laid, but rejects the application altogether. It may be fairly supposed that, if the learned Judge had stated the objection appearing against the presumption of a grant from the Crown, the defendant's Counsel, seeing the force of that objection, might have narrowed his requisition to the grant of some other person than the Crown. The result of the general overruling of the exception at the trial was, that the Judge conceived that neither branch of the question ought to go to the jury; and, if that be the fair interpretation of the learned Judge's refusal to yield to the defendant's demand, then I think it is open to this Court to review that decision, and say that, if it was wrong in part, the exception should be allowed.

Then, as to the objection that the manner in which the exception required the Judge to leave the question was, as it were, too loose, and would not have confined the jury within the strictly legal limits of their duty, namely, to say whether or not a deed or grant had been in fact executed, I do not see that the yielding to the exception at the trial would necessarily have led to that result. The learned Judge was, in substance and in effect, asked to submit to the jury the question of a grant; that is, the question of such a grant as, upon the evidence, it would be competent to them to find; that is, an actual grant in point of fact: the Judge is required to tell the jury that they are *at liberty to presume* a grant. Why are we to attach to the word "presume" the meaning that the jury were to guess at, or suspect or surmise a grant, without forming an

opinion upon the fact? The only way in which the exception could, in this respect, be more pointed, would be, by putting it in this form, that the jury were at liberty to consider whether in fact a grant had been executed. Their finding, that it had, would be a finding upon presumption, as distinguished from express and direct proof; and it appears something like special pleading to say that the word "presume" conveys more than that it was open to the jury to find the fact of a grant, notwithstanding the absence of direct and positive proof. It cannot, I think, be successfully contended that the defendant's Counsel were bound to point out by or to whom the grant to be presumed was made; that would have been to expose their client to the risk incurred by the defendant, in the case of *Blewitt v. Tregonning* (a), where the defendant, having pleaded grants by several distinct persons, was held bound to offer some evidence of the existence at least of those persons. In truth, the nature of the case assumes and pre-supposes the impossibility of fixing upon the particular grantor or grantee *nominatim*. The question must necessarily be left to the jury in a vague way, as was done in the cases of *Gray v. Bond* (b), *Roe v. Ireland* (c), and *Campbell v. Wilson* (d). In the first case, Dallas, C. J., says that it was properly left to the jury to presume a grant from *some* former owner of the soil. In *Livett v. Wilson* (e), the defendant pleaded a grant from a particular person; and this was also done in *Campbell v. Wilson* (f); and the usage induced the jury to find that such grant had in fact been made; but it is not necessary for a party who relies on such usage to specify the grant under which it was authorised. I cannot say that in this case there was any legal impossibility in the existence of a grant, if not from the Crown, at least from some of the various persons in whom the right to the several fishery was at intervals vested in fee, or even from the lessees in the lease of 1788, under which the plaintiffs claim. The question is not whether such a grant is probable.

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(a) 3 A. & E. 554.

(b) 2 B. & B. 667.

(c) 11 East, 280.

(d) 3 East, 294.

(e) 3 Bing. 115; S. C., 10 B. Moore, 439.

(f) 3 Camp. 294.

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Arguments have been used here to show that, upon all the facts of the case, it would not be reasonable to say that a grant existed. All that we have to consider is, whether anything appears on the case to oust the jurisdiction or functions of a jury. I cannot say that there is. I cannot say that there was no question to be left to a jury, as to a grant to be presumed by them to have been actually executed by some person or other, no matter whom, having authority to make such grant, so as to give legality and clothe with right the long exercise and usage proved on the part of the defendant.

I am, upon the whole, therefore, of opinion that the exception was properly allowed below, and that the award of a *venire de novo* ought to be affirmed.

RICHARDS, B.

The evidence on the part of the plaintiff, namely, the inquisition dated the 22nd of September 1609, shows very clearly that a several fishery had existed in the Moy river, from a place that is now known as the bridge of Ballina, but is therein described as the ford of the Abbey of Ardnaree, down to the sea, in and prior to the year 1609; and that such fishery had been in that year vested in the Crown; also, that the same fishery, as a whole and entire thing, was, *inter alia*, granted by the Crown to Lord Delvin, in 1611. The words of the patent to Lord Delvin are these:—
 “The entire of the fishery, fishing and taking of salmon and other kinds of fish of the bay, river, creek and water of Moy, in the county of Mayo, within our province of Connaught, within the entire space of ebbing and flowing of the sea and sea-water in the bay, creek, water or river aforesaid, extending from the Great Irish Ocean, from the north southwards, as far as the ford of the Abbey of Ardnaree, and thence re-flowing as far as the Irish Ocean aforesaid, to hold in common socage, at a rent of £5. 15s.” It further appears that Lord Delvin again granted over this fishery to one Henry Piers, and that the Crown subsequently, by way of affirmance, granted the same, by a further patent, bearing date the 15th of June 1613, to said H. Piers; in which are used, *inter alia*,

the words following, viz.:—"We do give, grant, bargain, sell and confirm to the aforesaid Henry Piers, his heirs and assign for ever, the entire fishery; fishing and taking of salmon and all other kinds of fish, in all places in or within the bay, creek, river and water and arm of the sea of Moy, in the counties of Mayo and Sligo, or in either of them, or within the confines thereof, as far as the sea or sea-water ebbs or flows, in or within the aforesaid bay, creek, water, river or arm of the sea of Moy aforesaid; that is to say, from the high sea as far as the ford of the Abbey of Ardnaree, in the county of Mayo or Sligo, or in either of them, or within the confines thereof, at a rent of £5. 16s., and to hold in common socage." The same patent also grants the soil, and entire liberty of drawing and drying nets and other instruments on the banks, &c. The plaintiffs also proved several attested copies from the Crown rentals, showing that this fishery had been put in charge, and that entries had been made in such Crown rentals, of payments of rent to the Crown, in the years 1612, 1613, 1615, 1624, 1627, 1637, 1639 and 1641; thus showing that Lord Delvin was tenant of the fishery in 1612, and that Piers was tenant thereof in 1613, and that one John O'Dowd was the tenant thereof in the subsequent years, down to 1641, in which last-mentioned year, being the year of the great rebellion in Ireland, this same fishery became forfeited to and again vested in the Crown. It further appears, that King Charles the Second, by patent, in the 13th year of his reign, on the 27th of July 1661, granted, in very general terms, to Sir George Preston, in fee, all and singular the fisheries therein referred to. By that patent it was recited that, "Divers fishings of salmon, &c., in the Shannon, and also the fishing in the sea, in and belonging to Connaught, and in Antrim (half county), have devolved and fallen to us by the delinquencies, forfeiture, attainder or rebellion of the several proprietors, which are now possessed or enjoyed by such person or persons to whom lands have been assigned near the said rivers and mills, without any grant or other authority from us, or any of our ministers and officers, and without any warrant from our Declaration for the Settlement of the Kingdom of Ireland, or without yielding to us any account

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T. T. 1859. "for the same;" and after reciting the services of Sir George
Exch. Cham. Preston, and his sufferings for the King's service, the patent granted,
 LITTLE amongst other things, "All and singular the fishings in the sea, in
 v. WINGFIELD. "and belonging to Connaught, to Sir George Preston, his heirs
 "and assigns for ever." The next document relied on by the plain-
 tiff was a second patent to Sir George Preston, from King Charles
 the Second, dated the 29th of May 1669. That patent recites the
 previous grant or patent of 1661, and states that, to render that
 grant or intended grant more effectual and beneficial to Preston
 "than at present the same is, we have given, granted and con-
 "firmed to Sir George Preston all the salmon fishings, oysters,
 "eyles and other fishings of and in," &c., enumerating a number of
 fishings and fishing-places not the subject of this action. It then
 proceeds thus:—"And also of and in the river Moy, in the county
 of Sligo," &c. There is then introduced into the patent a saving
 in the following form:—"Saving always, to all and every person and
 "persons who have had any decree from the late Commissioners
 "of our Court of Claims, in our said kingdom of Ireland, of the
 "premises, or any part thereof, full benefit of their respective
 "decrees." I next find that Preston, the patentee in the patent of
 1669, on the 2nd of September 1673, after reciting the patent of
 1669, grants, or professes to grant, over the same fishery, as a several
 and entire fishery, to Sir A. Forbes and to W. Hamilton, to be
 held from them in like manner as he Preston had held the same
 under the patent of 1669. The next document relied on by the
 plaintiffs was a deed, bearing date the 17th of September 1675,
 from Viscount Granard (Forbes), and Hamilton, to Sir Arthur
 Gore, whereby, after reciting the patent to Sir George Preston, of
 1669, and that, by a deed of 1673 Sir George Preston had con-
 veyed "All the fishings of the said river of the Moy, and of the
 brooks, creeks, members and fishing-places to the river belonging,"
 to said Viscount Granard and to Lieutenant-Colonel Hamilton,
 they, the said Viscount Granard and Hamilton, in consideration of
 £1000, conveyed to Sir Arthur Gore, "All the fishings of the said
 "river Moy, and of all the brooks, creeks, members and fishing-
 "places to said river belonging and appertaining, in as large a

“manner as the said fishings were granted to Sir George Preston.” Upon that deed is the following indorsement:—“Being present when Major Owen Vaughan, lessee of the fishing of the river of Moy, within mentioned, and of the creeks and fishing-places thereto belonging, surrendered his interest in all the fishings of the said river of Moy, within mentioned, and of all the creeks and fishing-places thereunto belonging, unto the within named Sir Arthur Gore, and delivered him, the said Sir Arthur Gore, upon his surrender aforesaid, the actual possession of the entire fishing of the said river of Moy, in the name of itself and of all the creeks and fishing-places thereto belonging, to enure to the said Sir Arthur Gore, and to his heirs and assigns; and also when the within named attorney, William Stafford, delivered, by and with the consent of the said Owen Vaughan, the actual possession, livery and seisin of all the fishings of the said river of Moy, within mentioned, in the name of the said whole river, and of the creek of Rapan, and of all other creeks and fishing-places thereto belonging, unto said Sir Arthur Gore, to enure unto him, his heirs and assigns for ever, according to the purport of the within deed, those whose names ensue.”—(Witnesses.) The plaintiffs then deduced title from Sir Arthur Gore to the Right Hon. James Cuffe, and showed that Cuffe, on the 25th of October 1788, made a lease of the fishery in question, dealing with it as a whole and entire and several fishery, to Messrs. Jones and Lindsay, for a long term of years, still subsisting, at a substantial rent, which has been duly paid ever since; and it was admitted that the title of the leasees in that lease is now vested in the plaintiffs. It is unnecessary, in respect to the portion of the case to which I am desirous of calling attention, to show how the fee of this fishery became vested in the Arran family, or to state in detail the various documents that were relied on by the plaintiffs, for the purpose of excluding the notion that there could have been a grant of any portion of this fishery, adverse to the title relied on by the plaintiffs. I allude more especially to the careful saving introduced into the patent to Browne in 1684, as to the rights granted to Preston by the patent of 1669, and to the various dealings in the fishery by the Arran family; all which

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T. T. 1859. *several facts and matters are, I admit, highly important with a view*
Esch. Cham. *to exclude any presumption that the small fractional portion of the*
LITTLE *fishery now claimed by the defendants had ever been granted away*
v. *or severed from the rest. But unless they amount to a legal conclu-*
WINGFIELD. *sion of that question (and, in my opinion, they do not), I see no*
necessity for recapitulating them here very minutely. My opinion
then is, that the learned Judge was wrong in wholly withdrawing
from the jury the question of the presumption of a grant from some
of the several persons through whom the title passed, from the con-
vveyance by Preston to Forbes and Hamilton in 1673. But attend-
ing to the documentary evidence anterior to that date, I must say
that I do not see any grounds for leaving it to the jury to presume
a grant of any portion of this fishery, or of any right of a free
fishery therein, up to the date of that instrument, inconsistent with
the title now relied upon by the plaintiffs. If Preston had, inter-
mediately between the date of the patent to him and his grant to
Forbes and Hamilton in 1673, made a lease or grant of any por-
tion of this fishery, or if he knew that the Crown had done so, he
would, I think, have been guilty of a gross fraud in passing it off on
his grantees in that deed, as a whole and entire thing unaffected by
any prior grant, either by the Crown or by himself. But I cannot
think that the Judge would have been warranted, on such an ima-
ginary case as that suggested in the argument, in leaving it to the
jury to presume that, in point of fact, a grant had been made by
the Crown, or by Preston, of this fishery, prior to 1673; and con-
fining myself to the period anterior to 1673, I say it would not be
safe, or, in my opinion, right, to tempt a jury to find the existence of
a deed or grant in opposition to a title so vouched and proved as the
title in this case has been down to the date I have mentioned. It is
said that the rule of law which empowers juries to presume, on the
evidence of long user, the existence of non-produced deeds and in-
struments, in affirmance of a right claimed, consistent with such
user, is a wholesome rule; and I do not deny its applicability to
the case of a several fishery in a navigable river, where, as here, the
legal creation of such an hereditament is shown. But I deny its
applicability (still confining myself to the period anterior to 1673)

to the present case, or as to a case like the present. My objection, therefore, to the exception of the defendants is, that it required the Judge to leave it to the jury to presume a grant from the Crown or from Preston. That is the portion, and the only portion, of the exception that I object to; and if I thought that I could allow the exception in part, and overrule it in part, I would very willingly do so; but, as some of the other Members of the Court think the exception good in *omnibus*, that course cannot be taken. With regard to the objections urged against the form of the exception, on account of its generality, I do not find any fault with it in that respect, except that which I have already stated. With regard to the argument that the exception must be construed as amounting to a requisition that the Judge should *direct* the jury to presume a grant, I would not be disposed so to read it; though I think it might have been a little more explicit on that head. I have said nothing about the parcel evidence in the case, and for this reason, that I concur with all the other Members of the Court in opinion that the exception is in part well founded, and that the question of presumption should not have been altogether withdrawn from the jury; at the same time, for myself, I confess I would be disposed to attribute the fishing relied on by the defendants (confined, as it was, between high and low-water mark only, and at the Sligo side of the river alone) to this circumstance, namely, that the Wingfields, being the lords of the manor of Scurmore, situate at the Sligo side of the river (for nothing but the fishery was granted to Preston), they were supposed to be entitled to fish in the limited way that has been proved, at the Sligo side, opposite Scurmore, and were, therefore, not prevented from doing so. This was a mistake, that the water-bailiffs of the Gores might very naturally have fallen into; and even the owners of a very extensive fishery might themselves have acted on the notion; and it is certainly a very remarkable circumstance, that the several settlements and deeds of the Wingfield family do not appear to deal with the portion of this fishery now claimed by them, in a way that they would be likely to have done, if it was considered by them that they had a title to it in any way,

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 WINGFIELD. or a right to take fish in this particular part of this very extensive and valuable several fishery of the plaintiffs. The documentary evidence of the defendants principally consisted of a decree of the Court of Claims, bearing date the 28th of December 1668, and the patent to Lewis Wingfield, following up that decree, and bearing date the 25th of June 1670. By the decree of the Court of Claims, it was adjudged that the lessee, Wingfield, was lawfully and rightfully entitled unto the lands, tenements and hereditaments therein mentioned, and, *inter alia*, to the lands of Scormore *alias* Scurmore (and the lands therein set out), lying and being in the barony of Tiveragh and county of Sligo, together with all and singular castles, houses, edifices, buildings, orchards, gardens, ways, waters, watercourses, mills, mill-seats, weirs, fishings, fences, bogs, loughs, furze, easements, privileges, advantages, commodities, assurances and appurtenances, to the premises, or any part thereof, belonging or in anywise appertaining, or therewith usually held, occupied, possessed or enjoyed, or which of right ought to be held and enjoyed, by the said Lewis Wingfield; and the whole of which premises are therein described as containing 2391a. 3r. 2p., plantation measure, and the quit-rent for which is therein set down at £24. 4s. 3d. We have next the patent that followed up that decree, bearing date the 29th of June 1672; whereby, after reciting the decree or certificate, as it is therein called, of the said Court of Claims, it is stated that his Majesty King Charles the Second, in pursuance of the Act of Parliament therein recited, being the Act for the Settlement of Ireland, after the rebellion of 1641, did thereby grant unto said Lewis Wingfield the several lands, tenements and hereditaments therein mentioned, and, *inter alia*, Skormore *alias* Skurmore, in the barony of Tiveragh and county of Sligo; and, amongst a number of general words therein used, this patent contains the following:—"Together with all ways, waters, water-courses, fishings, weirs, quarries, duties, services, and all and singular other profits, commodities, rights, privileges, advantages, emoluments and hereditaments whatsoever, to the said premises, or to any particular parcel thereof, belonging or in anywise appertaining, containing 2391a. 3r. 2p., plantation measure, at a quit-

"rent of £24. 4s. 3d. a-year." Now it would be quite impossible, in my opinion, successfully to contend that the decree of the Court of Claims, or the patent of 1670, passed, or could pass, or be construed as against the Crown to pass, to Lewis Wingfield, a several fishery in the navigable part of the Moy river; and there is certainly no trace of any other grant or patent from the Crown to Lewis Wingfield, or to any of the Wingfield family, or, in fact, to anyone, inconsistent with, or that could in any way derogate from, the patent to Preston, of 1669. In truth, the language of the decree of the Court of Claims, and of the patent of 1670 to Wingfield, very strongly corroborates (if corroboration were necessary) the title of Sir George Preston, under the patent of the previous year 1669, to this several fishery in the Moy river, and, instead of conflicting with the patent of 1669, is quite in accordance with it. Those documents, therefore, do not in the least shake the opinion which I had formed, in respect of the conclusive character, *quoad* the question of presumption, of the patent to Preston, of 1669, and of the grant from Preston to Forbes and Hamilton.

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Upon the whole, therefore, I am of opinion that we ought not to allow this exception, in its integrity; and, as it cannot be allowed in part, and overruled in part, for the reasons I have already mentioned, I believe there is nothing for it but to overrule the exception generally; and that is what I think ought to be done.

FIGOT, C. B.

I concur in opinion with my Brothers HAYES, O'BRIEN and GREENE. I think the question of presumption ought to have been left to the jury; I also think it would have been properly left in the very terms of the requisition comprised in the exception.

It is a perfectly settled rule of law, that continued exclusive enjoyment for twenty years, and for a period extending as much farther back as the testimony of living witnesses can be applied, is, in cases to which prescription is applicable, evidence of prescriptive title. Such a title, of course, must have commenced before the beginning of the reign of King Richard the First. If that evidence be encountered by proof that the enjoyment commenced within legal memory,

T. T. 1859. *i. e.*, after the beginning of that reign, such proof conclusively negatives the prescription. In like manner, in cases in which a prescriptive title is not required (as in the instance of easements, or of

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The presumptions, as to which the learned Judge was called upon to leave a question to the jury, were, first, of a grant "from the Crown;" secondly, of a grant "from some person (that is, some "person other than the Crown) having power and right to make "such grant." In my opinion, there was evidence which would have warranted either of these presumptions. First, as to a grant from the Crown; it is the common case of both parties that the fishery or fisheries of the entire navigable river in which the fishery in question is situate was at one time vested in the Crown. It was plainly, therefore, competent for the Crown to grant a several fishery in part of this navigable river. Long and exclusive enjoyment would in itself be some ground (whether strong or feeble we are not to determine on this bill of exceptions) for presuming such a grant. But, in this case, there was more. The rights acquired by Lewis Wingfield, under the Acts of Settlement and Explanation, by means of the decree of the Commissioners of the Court of Claims, coupled with the evidence of enjoyment, appear to me to have formed additional grounds for leaving to the jury a question of presumption of a grant

from the Crown. The evidence of enjoyment in the defendant, and in those who were in privity with him, extended over a period of seventy or eighty years previous to the recent dispute. That enjoyment was had by the same persons (or those in privity with them) who held the adjoining lands of Scurmore, by a title proved to have been derived from Lewis Wingfield. The earliest time at which Wingfield, or those under whom he derived, are shown to have been in possession of the lands of Scurmore, was the 7th of May 1659. That was the date at which the Act of Explanation (17 & 18 Car. 2, c. 2, s. 1) required that adventurers and soldiers should have been in possession of the allotted lands and tenements, in order to entitle them to a decree from the Commissioners of the Court of Claims. Accordingly, that was the date at which the decree of the Commissioners, of the 20th of December 1668, found that Lewis Wingfield, or those under whom he claimed, were in possession of the tenements and hereditaments which had been allotted to them, and to which Lewis Wingfield was adjudged entitled by that decree. The decree does not include, by name, the fishery in question; but it adjudges Lewis Wingfield entitled to several lands (including Scurmore), and to all fishings "to the premises, or any part thereof, belonging or in anywise appertaining, or therewith usually held, occupied, possessed or enjoyed." If Wingfield was then in possession of the fishery adjoining Scurmore, now claimed by the defendants, and if that fishery had then been usually enjoyed, together with the lands of Scurmore (although not an appurtenant to those lands, according to the legal import of that term), the decree would, I apprehend, have plainly given to Wingfield a right, under the 13th section of the Act of Explanation, to a grant from the Crown of this fishery, as part of the "lands, tenements and hereditaments decreed" by the Commissioners. The patent to Wingfield, of the 29th of June 1670, omits the words "or therewith usually held," &c.; and it is plain that the fishery could not have passed as an appurtenant; for, independently of any other reason, by the forfeiture of the former owners, the fisheries must have vested in gross in the Crown. This omission, Wingfield (if he was entitled to the fishery under the decree) was entitled, under

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T. T. 1859. the 13th section of the Act of Parliament, to have supplied
Exch. Cham. by a new patent. The proof of enjoyment for seventy or eighty
 LITTLE years of the fishery, by the same persons who held the lands of
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 evidence from which it may be inferred that, as the lands and the
 fishery were so enjoyed together during that long period, they were
 so enjoyed together down to that period from the time when Lewis
 Wingfield, or those under whom he derived, acquired Scurmore,
 and that they had been previously similarly enjoyed, before both
 were acquired by Lewis Wingfield. In that view of the case, what
 the jury would have been called upon to presume would have been,
 that an act had been done, not merely probable because it was in
 conformity with, and was proper to validate, long continued enjoy-
 ment, but probable, also, because it was in conformity with an
 obligation on the part of the Crown, and a right on the part of
 Wingfield.

I may observe here, that another presumption, involving much
 less than the granting of a patent, would seem to arise upon the
 16th section of the Act of Explanation. It is very questionable
 whether, if Lewis Wingfield applied for his patent, and paid the
 necessary fees, and, by reason of a misprision of the officers of the
 Crown, failed to obtain a patent granting all that was decreed to
 him, he did not, on the presumption* that all that was required on
 his part to obtain the patent was done in due time, acquire an
 indefeasible title, without any patent at all. On this, however, it is
 unnecessary to pronounce an opinion.

The arguments addressed to us, on the plaintiff's proofs, were
 only applicable to show that there was evidence, encountering that
 of the defendant, on which the jury ought to have refused to pre-
 sume a grant in favour of the defendant. That is a matter on
 which we are not to adjudicate on this record. Upon the applica-
 tion and weight of that evidence, the jury would have had to de-
 cide, in determining whether the inference or presumption sought
 to be drawn from the defendant's proof of the enjoyment ought, or
 ought not, to have been made. Further; it appears that the first

* See *Macdougall v. Purries* (2 Dow & Clarke, 135, 162).

patent to Sir George Preston, of 1661, was in terms so general as to render it very questionable whether, according to the *Bann Fishery case* (a), the fisheries with which we are dealing passed to him at all; and the patent which he subsequently accepted, of the 29th of May 1669, recites (as the reason for making the grant) that, "as to some parts of the fishings contained in the former patent, "Sir George Preston had been disappointed by decrees in the Court of Claims, and for want of more particular expressions than in "the former grant contained;" and it expressly saves the right of any person who had a decree under the Court of Claims. The decree in favour of Lewis Wingfield was anterior to both these patents. If the fishery claimed by the defendant was adjudged to Lewis Wingfield by the decree, as a fishery which had been usually held with Scurmore, it did not pass to Preston by the patent of 1669, his acceptance of which appears, upon the face of it, to have been upon a relinquishment, or denial, of title on his part, to what had been decreed to others by the Court of Claims. For all these reasons, I am very clearly of opinion that the jury ought to have been told, as required by the first exception, that they were at liberty to presume a grant from the Crown.

Secondly; as to a grant from some other party. Mr. *Fitzgibbon*, in a very skilful dissection of the evidence, has shown that there were several periods in which (independently of any possible acquisition prior to the forfeiture of Lord Delvin) persons, in privity with whom the parties in this action now respectively stand, were perfectly competent to make, and to accept, a grant of the fishery, if it passed to Sir George Preston under either of his patents. I shall only advert to one of these periods, viz., that in which Sir George Preston had full dominion to part with the fishery, if he ever acquired it, or to grant a part, as a several fishery, of what he had acquired. If Lewis Wingfield had become entitled, under his decree, to the fishery now claimed by the defendant, as a fishery which had been usually enjoyed together with Scurmore, and if it had passed to Preston by either of his two patents, both being subsequent to the decree, the patent passing

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(a) Sir J. Davies, 55.

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 WINGFIELD. by misinformation of the Crown. In that state of things, it would appear not to be an improbable event that Preston, to avoid the expense, delay and risk of such a proceeding, should have done an act in conformity with the true and rightful title, by making to Wingfield, a grant of that fishery (as that portion of the fishery or fisheries granted to him) which adjoined the lands of Scurmore, and had been usually enjoyed together with those lands.

It is unnecessary to advert, in detail, to the other periods in which a grant might have been similarly made by some of those deriving under Sir George Preston. I think the jury ought to have been told that they were at liberty to presume such grant. With respect to the form in which the direction was called for, it appears to me to be a clear and convenient form for leaving a question of presumption to the jury, upon such issues as those on which the present case was tried. It is the form in which, during my own experience, now a pretty long one, Counsel have been in the habit of requiring questions of presumption to be left, and in which Judges have presented them to juries. It is one of the most important functions of a Judge, in submitting the necessary questions to the jury, to select the plainest, shortest and most simple form of words, freed, if possible, from all technicality, and narrowed within such limits as shall make them easily intelligible to ordinary minds. It would probably be, in strictness, a legal charge or summing up, not only to describe to the jury, by dates, each interval within which a grant might have been made, but to specify the various dates which the deed of grant might by possibility have borne, and, by Christian and surname (or other description) to specify the various sets of parties between whom such instruments might have been executed. The minds of the jury might thus have been incumbered by some score or scores of dates, and, perhaps, some hundred parties. But such a charge, though it might be sustainable at law, would have tended to frustrate, rather than aid, the functions of a jury. The duty of the Judge would be better dis-

charged by pointing out to the jury, succinctly, the periods at which a valid grant might have been made by competent parties, and leaving it to them to determine whether, from the proof of enjoyment, they would or would not presume that, at some of those periods, and by some competent parties, a valid grant had been made. It has been urged that a question of presumption ought not to have been made, without presenting to the jury the consideration of some specific deed or deeds of grant, and *Blewitt v. Tregonning* (a) was cited. Supposing that that case was not determined on the ground that the evidence rather sustained a prescriptive right than a lost grant, and that the decision can be sustained on the other grounds stated in the report (on which I pronounce no opinion), it is wholly inapplicable to the case before us. In that case there were specific issues framed on allegations in the pleadings, of specific deeds, set out (very unnecessarily, as it appears to me) by their dates. In the present case there is nothing of the kind. The question here, on each of the principal issues, is, whether the fishery in dispute was the fishery of the plaintiff or the fishery of the defendant. Suppose the jury, after the Judge had left to them the consideration of any number of possible deeds, by dates and parties' names, had, after consideration, stated to him—"We are not all agreed as to the execution of any one particular deed of grant; but we are all of opinion that, at some time at which it could have been lawfully done, a valid grant of the fishery was made by a competent party to one of the persons under whom the defendant derives; we are satisfied that in no other way can the enjoyment of the fishery proved before us be satisfactorily accounted for; and, therefore, we find that it is the fishery, not of the plaintiff, but of the defendant"—I apprehend it would be the duty of the Judge to record that finding as a finding for the defendant, upon the two first issues, and that it would be impossible to disturb it on the ground that the question was not rightly dealt with by the jury. Such a finding would not have been suited to the issues in *Blewitt v. Tregonning*; but such a finding would be perfectly adapted to the issues in the present case. In an old and remarkable authority—

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(a) 3 Ad. & E. 554.

T. T. 1859. *Exch. Cham.* that in which it was held that jurors should not be fined for a wrong verdict—*Bushel's case* (*Vaughan's Rep.*, p. 150), it is laid down that "The legal verdict of a jury to be received is, finding for **LITTLE** the plaintiff or defendant. What they answer, if asked, to ques-
v. tions concerning some particular fact, is not of their verdict essen-
WINGFIELD. tially, nor are they bound to agree in such particulars. If they
"all agree to find their issue for the plaintiff or defendant, they
"may differ in the motives wherefore; as well as Judges, in giving
"judgment for the plaintiff or defendant, may differ in the reasons
"wherefore they give that judgment, which is very ordinary." The same view is clearly expressed by Mr. Justice Maule (and is also, I think, indicated by Lord Chief Justice Tindal), in *Davis v. Lowndes* (a). The direction called for in the present exception appears to me to state, with great precision, the three main elements for the consideration of the jury; first, that of long-continued exclusive enjoyment; secondly, that of the existence of a person competent to make the grant; thirdly, the question of fact (the subject of the proposed presumption) whether such a grant was made. The form of the requisition cannot be distinguished from that of the instruction to the jury, which was approved and upheld in *Gray v. Bond* (b).

The plaintiff's Counsel contended, in the argument before us, for the proposition, as a general one applying to all claims to corporeal or incorporeal hereditaments (save as to ways, easements and rights which may be exercised by one person in the land of another), that a presumption of a grant or conveyance cannot be made except to fortify a rightful title; and *Doe v. Cooke* (c) was cited. That case

(a) 1 M. & Gr. 479, 480; S. C., 1 Scott, N. R., 328; see 5 Bing., N. C., 161, 182-3; 7 Scott, 21, 66, 68.

(b) 2 Bro. & Bing. 667; S. C., 5 B. Moo. 327. See the observations of Lord Wensleydale, in *Wright v. Walker* (1 Cr., M. & R. 217); in *Jenkins v. Harvey* (ib. 894); and in *St. Mary Magdalen's College v. Attorney-General* (3 Jur., N. S., 675); of Tindal, C. J., in *Tenny v. Jones* (10 Bing. 80); of Pollock, C. B., in *Gibson v. Doeg* (2 Exch., N. S., 623); the findings of the jury in *Reg. v. Petrie* (4 Ell. & Black. 743); see *Reg. v. Eastmark* (11 Q. B. 877); and the question left to the jury in *The Duke of Beaufort v. Mayor of Swansea* (3 Exch. 414).

(c) 6 Bing. 174; S. C., 4 M. & P. 411; see this class of cases referred to, 3 Stark. 917, n. q.

determined that, in favour of a defendant in an ejectment, and to defeat the title of the lessors of the plaintiff, a presumption, from possession alone, ought not to be made of the re-conveyance or cesser of a mortgage term, which, but for such presumption, would be vested in one of the lessors. And the proposition is unquestionable, as applied to that and to many other cases in which the possession is not inconsistent with the right, against which it is sought to apply the presumption (a). But if the proposition be understood as affirming that continued possession of an incorporeal hereditament (as a fishery), to the exclusion of those who, but for a former grant, would be the owners, does not warrant a presumption of such grant to the party in possession, or to some person under whom he derives, *unless* he shows a title which he seeks to fortify by the presumption, the proposition, in that sense, cannot be law. It is opposed to a long series of authorities, some of which, including *The Mayor of Hull v. Horner* (b), have been cited at the Bar. It would make loss of title-deeds a forfeiture of property, and render it impossible to establish by any exclusive enjoyment, however long, a presumption of a royal grant of property once vested in the Crown. It has been sought to reconcile this proposition with the familiar practice of presuming a grant, from uninterrupted enjoyment of an easement for twenty years, by suggesting that such a presumption is not made against the title *to the land*. But that distinction is, as an argument for this purpose, a fallacy. A title, in fee-simple, to the land is a title to the whole land in plenary enjoyment. The enjoyment of an easement in the land is, *pro tanto*, as inconsistent with that plenary title as, for the whole land, would be the possession of the land itself. The first act of enjoyment of a way over land is, in contemplation of law, equally an act of trespass as the taking possession of the land; and at the end of twenty or a hundred years' enjoyment of the way, there is no more reason to refer that enjoyment to a lawful origin, in a grant of the way, than there is to

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(a) See this class of cases referred to, 3 Starkie on Ev. 917, note g; and see *Doe v. Pike* (3 B. & Ad. 738); *Hall v. Surtees* (5 B. & Ad. 687); *Doe v. Mitchell* (11 Q. B. 1036).

(b) Cowp. 102-8, 9, 10; see the cases collected, 1 Taylor on Ev. 129, et seq.; 3 Stark. on Ev. 914, et seq.

T. T. 1859. refer to a similar origin the uninterrupted and exclusive enjoyment,
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For all these reasons, I concur in the opinion that the judgment
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LEFROY, C. J.

In this case, I am of opinion that the judgment of the Court below, allowing the second exception, should be affirmed. As I understand the defendant's claim, he does not dispute the plaintiff's title to the general fishery of the river Moy, but only claims a partial right of fishery in two localities at full tide in that river, at a place called Scurmore, of which he is the landed proprietor. Of that right he has, in my opinion, not only laid a foundation for a presumption, but has given evidence which may not improperly be called evidence of a parliamentary title. By the Act of Settlement, there is a provision that all the lands, tenements and hereditaments which had been allotted to the persons thereby called adventurers, for services, of which they were in the actual seisin, possession or occupancy, on the 7th day of May 1659, should be confirmed to them, and, for the ascertainment whereof, proceedings were to be taken by the claimants in the Court of Claims, as thereby directed; and, upon a decree of such Court, a patent should be granted accordingly. It appears that, the proper proceedings having been taken, a decree was accordingly obtained from that Court, on the 28th of December 1668, by Captain Wingfield, an ancestor of the defendant, ascertaining his right, under the provisions of the Act of Settlement, to the lands of Scurmore, amongst others, "with all and singular waters, watercourses, mills, mill-seats, "weirs, fishings, commodities, appendances and appurtenances to the "premises, or any part thereof, belonging or in anywise appertaining, or therewith usually held, occupied, possessed or enjoyed;" finding also, "that the lands, tenements and hereditaments so "claimed had been set apart and set out to the said Lewis Wingfield, or those under whom he claimeth, for their service as "soldiers, in the late wars of Ireland, and were, on the 7th day "of May, in the year 1659, in the actual seisin, possession or

"occupation of the said Lewis Wingfield, or those under whom
"he claimeth, his or their lessees or undertenants." By this pro-
ceeding, his title was established as of the 7th of May 1659, under
the Act of Parliament, and of course overreached the patent to Sir
George Preston, of 1669; and it is observable that there is in that
patent a saving for "all and every person and persons who have had
"any decree from our late Commissioners of our Court of Claims,
"in our said kingdom of Ireland, of the premises, or any part
"thereof, the full benefit of their respective decrees." Here, then,
surely is the root of a title, with which the evidence of possession
given by the defendant, as far back as living memory, may well
connect itself, independent of every other presumable title which
might be suggested. It must also be recollected how strong the
evidence of user and possession was, as having been exercised
adversely so long, in the very presence of those who now resist
this claim, and their more than acquiescence, by the purchase of
fish from time to time, to which, if there be anything in their
present claim, they were entitled as their own. Under these cir-
cumstances, I cannot doubt that it was erroneous to tell the jury
there was nothing to warrant them in finding that Colonel Wing-
field, the defendant, had a title to a several fishery in Scurmore.

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Judgment affirmed.

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Evidence of acting in a public office is evidence to go to the jury of a title to that office, as against a wrong-doer, though the title be put in issue by the pleadings, and the appointment is required to be under seal.

Such evidence of acting raises a presumption that all the formalities necessary to be completed to authorise such acting have been complied with.

A statement of the plaintiff, that he was appointed in 1859, and the fact of a subsequent exercise of the office—*Held*, evidence to go to the jury of a title to such an office, though the plaintiff's title was traversed, and he admitted that he had acted without title for seven years previously to 1859.

An inland town, from the market of which butter is conveyed direct for the foreign market, is not a "place of export from whence butter is commonly shipped for exportation," within the meaning of the 52 G. 3, c. 134, and 7 & 8 G. 4, c. 61.

THIS was an action for the disturbance of the plaintiff in his office of public weighmaster of butter, for the town of Tipperary. The first count stated that, before and at the time of the passing of the 52 G. 3, c. 134, Tipperary was, and still is, a market-town in Ireland wherein butter is bought and sold, and exposed to sale; and that the plaintiff, after the passing of that Act, and before, &c., was appointed, pursuant to the said Act, sole public weighmaster of butter for that town, and from thence had been, and still was, lawfully possessed of said office, and entitled to certain fees and emoluments appertaining thereto; and that while the plaintiff was so possessed of that office, the defendant, on the 21st of October 1859, and at other times, without any right or lawful authority, did exercise the said office of public weighmaster for the said town, and did take divers fees and emoluments, perquisites and profits belonging to the said office, and thereby hindered and disturbed the plaintiff from exercising the said office in as full and ample a manner as he otherwise might, to the plaintiff's damage, &c. The second count stated that the plaintiff was lawfully possessed of the said office of public weighmaster, whereby great gains, &c., were, and still of right ought to be, received by him; yet the defendant, without any lawful authority, had opened a public weigh-house in the said town of Tipperary, and had received there certain fees, viz., two pence for each firkin weighed in said weigh-house, whereby, &c. The third count, after

* Before FITZGERALD and HUGHES, BB.

stating that the plaintiff was possessed of the office and entitled to the emoluments thereof, complained that the defendant wrongfully employed his servants and agents to stand near the plaintiff's weigh-house, for the purpose of enticing away therefrom, and inducing not to resort thereto, divers farmers and others who otherwise would have resorted to same; and that the defendant's said servants and agents did stand near the plaintiff's weigh-house, and did entice away from, and induce not to resort thereto, farmers and others who otherwise would have resorted thereto, and would have given plaintiff certain fees, and thereby disturbed the plaintiff in his office, &c. The fourth count was for money had and received. The material defences were the following:—First, that the plaintiff was not duly appointed public weighmaster of the town of Tipperary, pursuant to any Act of Parliament, nor at all lawfully appointed to or possessed of the office, nor entitled to the fees and emoluments thereof. Third defence: as to the second and third counts, that the plaintiff was not lawfully possessed of the said office of public weighmaster, as in those counts respectively alleged. Eighth defence: as to so much of the first count as alleged that the defendant took fees and emoluments belonging to the plaintiff, and to so much of the second count as alleged that the defendant took fees to which the plaintiff was entitled, and as to so much of the third count as alleged that defendant prevented any persons from resorting to the weigh-house of the plaintiff, and from paying him the fees to which he was entitled—"That the plaintiff was not at any time before the commencement of this action legally entitled to demand or be paid any fees for the weighing of any butter, as such public weighmaster of said town; for defendant says that there was not, at the time of the appointment of the plaintiff as such weighmaster, or at any time since, up to or at the commencement of this suit, any taster of butter appointed, pursuant to the provisions of the statute in that behalf, to taste and approve butter in said town of Tipperary; and the defendant further says that, until the butter was tasted and approved of by a taster appointed for said town, in pursuance of the statute in that behalf, the plaintiff was not legally entitled or empowered to weigh any butter in his character of public weigh-

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“master of butter for the said town, or to demand or be paid any fees, emoluments, perquisites or profits for the weighing of butter in said town, as such public weighmaster as aforesaid.” *Replication to eighth defence*—That plaintiff was appointed public weighmaster of butter for the town of Tipperary, after the passing of the 7 and 8 G. 4, c. 61, and that the said several acts of the defendant were done subsequent to the passing of that Act; and that the said town of Tipperary is not a *seaport*, nor a place of export from which butter is commonly shipped for exportation. Upon these pleadings the following issues, material for the purposes of this report, were settled:—First. Was the plaintiff duly appointed to or possessed of the office of public weighmaster of butter for the town of Tipperary, or entitled to the fees and emoluments appertaining to said office, or to the plaintiff, as such public weighmaster, as in the first paragraph of the plaint alleged? Thirdly. Was the plaintiff lawfully possessed of the office of public weighmaster of butter for the said town of Tipperary, as in the second and third paragraphs of the plaint alleged? Tenth. Is the town of Tipperary a seaport or place of export of butter, within the meaning of the statutes in that behalf? At the trial, before GREENE, B., at the Spring Assizes for the county of Waterford, the plaintiff was examined as a witness on his own behalf, and proved the disturbance in his office by the defendant. He stated that he had been acting as weighmaster of butter for the town of Tipperary since 1852; that he had a weigh-house, beams and scales and every requisite, and charged three pence per firkin for weighing, up to the date of his appointment, 21st of October 1859; that on market days he charged four pence per firkin, the additional penny going to the owner of the tolls; that after his appointment on the 21st of October 1859, he only charged two pence per firkin, as he was advised that this was the legal charge; that the defendant opened a weigh-house in July 1859, and weighed butter, charging two pence per firkin. He also stated that Tipperary was not a seaport town; that ships never came there, but added that it was a place of export from which butter was commonly shipped. On cross-examination he admitted that he had charged three pence per firkin from 1852 to

1859, without any appointment, and while there was another weighmaster in existence, a person named Mansergh, who was induced to retire, in consideration of a payment of £5. That after October 1859, he acted just as he did before, except that he charged one penny less. He was also cross-examined on some matters going to his credit, and when re-examined on those points he stated that he had been appointed weighmaster on the 21st of October 1859, by the votes of twenty-one Magistrates.

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The plaintiff closed his case without giving any documentary proof of his appointment, or of his having complied with the requirements of the 52 G. 3, c. 134.

Counsel for the defendant then called for a nonsuit, or a direction on the issues involving the validity of the plaintiff's title to the office.

His Lordship held that there was evidence to go to the jury of a due appointment pursuant to the statute, but reserved liberty to the defendant to move to enter a nonsuit or a verdict for him.

The defendants' case was then opened, and evidence was given by several of the witnesses produced on their behalf, that the practice of the butter buyers was to close the casks in Tipperary, and send them direct to parties in England, without any intermediate dealing at the port of actual shipment, and that the Railway gave through tickets to the consignor in Tipperary.

The learned Baron then charged the jury, and left the issues involving the plaintiff's title to them as questions of fact.

The jury found for the plaintiff, on all the issues except the tenth, and assessed the damages at £50; and upon the tenth issue they found for the defendant, under his Lordship's direction, that Tipperary was a place of export for butter, within the meaning of the statute.

J. E. Walsh, in Easter Term, obtained a conditional order on the part of the defendant, to enter a nonsuit or a verdict for the defendant, pursuant to leave reserved, and that, notwithstanding the findings on the other issues, a general verdict and judgment should be entered for the defendants, grounded upon the finding on the tenth issue, or that judgment should be entered for the defendants as to all the causes of action covered by the eighth

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defence, and that judgment should be arrested as to the remaining causes of action, or for a new trial, on the ground of misdirection of the learned Judge, and that the verdict was against the weight of evidence.

A conditional order was also obtained by *R. Armstrong*, on the part of the plaintiff.

R. Armstrong, with him *C. H. Hemphill*, for the plaintiff.

There was evidence to go to the jury, on the first issue, of a due appointment of the plaintiff, pursuant to the 2nd section of the 52 G. 3, c. 134. That Act requires an appointment under the hands and seals of the Justices. We admit no such appointment was proved, but the plaintiff himself swore he was appointed by twenty-one Magistrates. Upon the direct examination he did not say anything about his appointment, and he was not cross-examined on the point. The statement that he was appointed by twenty-one Magistrates was made on re-examination. That was evidence to go to the jury of a due appointment. Again, he proved that he acted in the office and charged fees. That was evidence to go to the jury of a due appointment, as against a wrong-doer, though the appointment was directly in issue: *M'Mahon v. Lennard* (a), in which the Lord Chancellor says, at p. 1000:—"There is no doubt that, in the case of a public officer, it is in general not necessary to show his appointment, but his acting in the office will be sufficient proof, and that, whether the question arises incidentally, or is directly in issue." The evidence of all the witnesses pre-supposes the appointment; it was assumed throughout the entire case. In *M'Gahey v. Alston* (b), the title of the plaintiff was traversed as here, and it was held that acting in the office was evidence of an appointment. *Doe v. Barnes* (c) is an authority to the same effect. There are cases in which it has been held that the presumption of a due appointment, arising from the exercise of an office, was rebutted by other evidence in the same case: *Smith v. Cartwright* (d); *Rez*

(a) 6 H. L. Cas. 970; S. C., 4 Ir. Com. Law Rep. 16; 5 Ir. Com. Law Rep. 209.

(b) 2 M. & W. 206.

(c) 8 Q. B. 1037.

(d) 6 Exch. 927.

v. *Verelst* (a). In the first of these cases the plaintiff put in a document as proof of his appointment, which invalidated the presumption; and in the other the presumption was completely rebutted by the defendant's evidence.—[FITZGERALD, B. The question here is, whether you did not yourself rebut the presumption, by admitting an illegal acting for seven years prior to October 1859.]—No; we proved a change in the plaintiff's charge subsequently to October 1859. That only goes to the weight of the evidence. It may have thrown suspicion on the appointment, but that was a question for the jury. The exercise of the office also raises a presumption that the plaintiff took the necessary oaths, and complied with all the requisite formalities: *Powell v. Milburn* (b).

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We then come to the question raised by the conditional order taken by the plaintiff. The learned Judge directed a verdict for the defendant, on the tenth issue, upon the ground that the town of Tipperary was a "place of export" for butter, within the meaning of the Butter Acts, and that there was no taster of butter for the town. We submit that this direction was wrong, and that the office of taster has been abolished in Tipperary, and towns similarly circumstanced. In the first place, it is opposed to the ordinary meaning of language, to hold that Tipperary, an inland town, is "a place of export," which must be understood to mean "a place where butter is shipped;" and, in the second place, it is opposed to the language of the statutes. The 52 G. 3, c. 134, s. 2, provides for the appointment of some one or more discreet and skilful person or persons to be a public weighmaster, or joint public weighmasters, and taster or tasters of butter, in every city and town corporate in Ireland (except the city of Cork), and in every seaport or place of export from whence butter is commonly shipped for exportation from Ireland, and in every market-town wherein butter is bought or sold or exposed to sale for the purpose of trade. The 7 & 8 G. 4, c. 61, s. 1, after reciting those provisions of the 52 G. 3, c. 134, enacts, that "So much of the said recited Act as relates to the "appointment of tasters of butter in any city, town corporate or "market-town in Ireland, not being a seaport or place of export,

(a) 3 Camp. 432.

(b) 2 Wm. Bl. 851.

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"and as relates to the duties to be performed by such tasters of butter in any such city, town corporate or market-town, not being a seaport or place of export, and as relates to the tasting and proving casks of butter within any such city, town corporate, borough or market-town as aforesaid, not being a seaport or place of export, shall be, and the same is, hereby repealed." That section abolishes the office of taster in Tipperary, unless it is a seaport or place of export. "Seaport" and "place of export" are used as synonymous terms. In several of the sections, as in the 13th, 14th, 17th and 18th, where seaports were plainly within the contemplation of the Legislature, the word "place of export" is alone used. The 20th section enacts that, if "Any land-waiter, or other revenue officer entrusted with the lading or putting on board any butter, for the purpose of being exported from Ireland, shall permit or suffer any cask or casks of butter to be shipped or laden on board any ship, boat or vessel, in order to be exported as merchandise," save as mentioned, "without having been previously weighed, branded and marked by the weighmaster of the seaport or place of export where such butter shall be shipped or put on board," he shall incur the penalty therein mentioned. That shows "place of export" means a place where there are ships. It will be contended that "place of export" means any place where butter is made up for the purpose of being sent abroad; but to take butter made up in inland towns, for shipment in Dublin, out of the provisions of that 20th section, it was enacted by the 7 & 8 G. 4, c. 61, s. 2, "That nothing in the 52 G. 3, c. 134, contained, shall extend to oblige the proprietor of any butter conveyed to the city of Dublin for shipment there to subject said butter to inspection and branding in the city of Dublin, unless such butter be sold or exposed for sale in the said city." Further, the 2nd section of the 52 G. 3, c. 134, itself puts a construction on "place of export;" the words are "every seaport or place of export from whence butter is commonly shipped for exportation."

Lastly, the action is maintainable, although there ought to be a taster. If the plaintiff were appointed a weighmaster, he was *ipse*

facto taster. Tasting is merely a function of the office of weighmaster: *Kelly v. Molony* (a); and he might be disturbed in his office of weighmaster, for the statute gives distinct fees for weighing and tasting.

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J. E. Walsh and *J. Harris*, contra.

There was no evidence to go to the jury of a due appointment. The authorities in which acting in an office has been held evidence of a due appointment to it proceed upon the principle that it cannot be supposed that any man would venture to intrude himself into a public situation which he was not authorised to fill: 1 *Taylor*, s. 139. Here the plaintiff admittedly acted illegally from 1852 to 1859; and, therefore, the whole basis of the rule fails.—[FITZGERALD, B. There appears to have been a change, marked by a difference in the charge of fees, in the year 1859.]—There is not one moment of undisputed acting in the case, to lay before the jury as evidence of an appointment; and there is no case where acting during a period when the title was in dispute was held evidence.—[FITZGERALD, B. You never questioned his office. Infringing his office is one thing, disputing his title is another.]—We did what was inconsistent with his title. It would be absurd to say that a man may assume office for a few hours, and then sue another for doing the same thing, relying on his acting as evidence of an appointment. It can make no difference whether there is an actual dispute of title, or a denial by the one of the legality of that which the other asserts to be legal. In 1 *Taylor*, s. 142, it is treated as doubtful whether the rule at all applies to a case where the question of appointment is directly in issue. In *Collins v. Carnegie* (b), in an action for slander, which consisted in a denial of the plaintiff's title to Doctor of Medicine, it was held that proof of acting was insufficient.—[FITZGERALD, B. Does that apply to a public office?]—*Smith v. Cartwright* was the case of a public office. There, it was held that the inference from acting ceased as soon as it was shown that the acting had reference to something else than a legal appointment. That principle exactly applies to the present case. In *McMahon v. Lennard*, the decision of the Judges was, that there

(a) 4 Ir. Com. Law Rep. 413.
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(b) 1 Ad. & El. 695.
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was no case to go to the jury. The observation referred to is a *dictum* of the Lord Chancellor. Further, it is difficult to see how acting shown to have arisen prior to the appointment in question can be treated as evidence of a due appointment. The withholding by the plaintiff of his appointment ought also to raise a presumption against him. Evidence of acting, upon which a jury can only found a conjecture, ought not to be left to them: *Avery v. Bowden* (a); *M'Mahon v. Lennard* (b); where it is said, "That if the evidence was such that the jury could conjecture only, and not judge, it ought not to go to the jury; that the *onus* was on the party offering the evidence, and that, if he only offered evidence consistent with either supposition or fact, he was not entitled to have it put to the jury." Again, the 52 G. 3, c. 134, requires certain acts to be done, and formalities to be complied with, before the appointment is perfected; and no case has been cited in which mere acting was held sufficient, where an appointment under hand and seal, with particular statutable formalities, was necessary to the validity of the appointment.—[FITZGERALD, B. The authorities seem to go upon a principle which equally applies to that case, because they are founded on the presumption that no one would act without authority].

Then arises the question upon which we have got a verdict, viz., whether Tipperary is a "place of export." We must suppose that the Legislature had some meaning in the words they used; but if "seaport" and "place of export" are synonymous, why are the two expressions used all through the statute? Some sections of the 52 G. 3, c. 134, were referred to, in which "place of export" was alone used. That argument would have some weight, if the word "seaport" were alone used. The use of the more general term proves nothing. The 20th section has reference only to what was done by custom-house officers. What could be the meaning of leaving out the words "from whence butter is commonly shipped," in the 1st section of the 7 & 8 G. 4, c. 60, if it were not to put "seaport" in direct contradistinction to "place of export?" "Place of export" means any place in which goods are made up to be sent to a foreign market.

(a) 6 Bl. & R. 272.

(b) 6 H. L. Cas. 933.

They also cited *Walton v. Gavin* (a); *Connell v. Curtis* (b); T. T. 1860. *Marshall v. Lamb* (c); *Berryman v. Wise* (d); *Regina v. Grimshaw* (e).

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C. H. Hemphill, in reply.

Cur. ad. vult.

FITZGERALD, B.

This is an action brought by Dexter, who, in the first paragraph of the plaint, alleges himself to be the public weighmaster of butter for the town of Tipperary, duly appointed, pursuant to the 52 G. 3, c. 134, and complains of a disturbance in his office by the defendant Hayes, in exercising the office, and taking the fees pertaining to it. In the second paragraph, he alleges himself to be possessed of and entitled to the office, and complains that the defendant opened a public weigh-house for butter in the town of Tipperary, and took the fees payable under the statute to him as public weighmaster. By the third paragraph he also alleges himself to be possessed of and entitled to this office, and complains that the defendant employed servants to stand near his weigh-house, and prevent persons from coming there to have their butter weighed; who did, accordingly, prevent persons, and so deprive the plaintiff of the fees which he otherwise would have received as such public weighmaster. By a fourth paragraph he claims money had and received by the defendant to his use.

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To this plaint several defences have been pleaded by the defendant; those appearing to me material are:—First; a traverse of the plaintiff's appointment, pursuant to the statute 52 G. 3, c. 134, on which there is an issue joined. Second; traverses of the several disturbances alleged in the plaint, on which also there are issues joined. Third; defences, in the nature of special traverses, to the first and second paragraphs, stating in substance that the defendant, with certain other butter merchants in Tipperary, did weigh butter for

(a) 16 Q. B. 48.

(b) 2 Bing. N. C. 228.

(c) 5 Q. B. 115.

(d) 4 T. R. 366.

(e) 10 Q. B. 747.

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persons selling butter to them; that they opened for that purpose a private weigh-house, in which the butter sold to them was weighed by private servants of their own, and that, by voluntary arrangement between them and the sellers of butter to them, a sum per firkin for the butter weighed was paid by the sellers; and traversing disturbance of the plaintiff in his office otherwise. On these defences the issues framed are, whether they are true in substance and fact? Fourth; a further defence to so much of the first three paragraphs of the plaint as complains of disturbance by taking, or preventing the plaintiff from receiving, the fees of his office, that there was no taster of butter duly appointed for the town of Tipperary, and that, by reason thereof, the plaintiff was entitled to no fees for weighing butter.

This last defence is founded on a provision of the statute 52 G. 3. c. 134, by which the duty of the weighmaster, in respect of which fees are payable, is confined to weighing butter which had been first tasted and approved of by a taster appointed under that Act.

To this defence there is a replication, that the provisions of the Act 52 G. 3, c. 134, as to the appointment of a taster, and the tasting and approving of butter before weighing, are repealed by the statute 7 & 8 G. 4, c. 61, except as regards seaports or places of export whence butter is commonly shipped for exportation; and on this the issue joined is, whether Tipperary is a place of export, within the meaning of the statutes in that behalf?

On the trial before my Brother GARRICK, at the last Spring Assizes for Waterford, a verdict was found for the plaintiff, on all the issues joined, except the last, but subject, by the Judge's leave, to be turned into a verdict for the defendant, in case this Court should be of opinion that there was no evidence to go to the jury of the plaintiff's appointment to the office of public weighmaster of butter. On the last issue, which is the ninth, a verdict was found, by the direction of the Judge, for the defendant, but subject, by his leave, to be turned into a verdict for the plaintiff, if the Court should be of opinion that such direction was wrong. A conditional order having been obtained by the defendant, pursuant to the leave now used to enter a verdict for him, and also for a new trial, on

the ground that the verdict for the plaintiff was against evidence, and the weight of evidence; and, a conditional order having been obtained by the plaintiff, that the verdict on the tenth issue should be entered for him, cause was, in the last week, shown against both orders, before my Brother HUGHES and myself. We are of opinion that the cause shown against the conditional order obtained by the defendant must be allowed, and that the cause shown against the conditional order obtained by the plaintiff must be disallowed, and that order made absolute; the effect of which will be, that there will be a verdict on all the issues for the plaintiff. In substance the questions to be considered are:—First; whether there was evidence proper to be left to the jury of the plaintiff's appointment as public weighmaster of butter, for Tipperary, under the Act 52 G. 3, c. 134? Secondly; whether the verdict for the plaintiff, on the defendant's traverses, general and special, be against the weight of evidence? Thirdly; whether Tipperary be a place of export, within the meaning of the Acts 52 G. 3, c. 134, and 7 & 8 G. 4, c. 61?

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First.—The 2nd section of the Act 52 G. 3, c. 134, provides that, in any seaport or place of export from whence butter is commonly shipped for exportation from Ireland, such place being no city or town corporate, and in every market-town wherein butter is sold, or exposed to sale, for the purposes of trade, the Justices of the Peace for the county or counties in which such seaport or place of export or market-town respectively be, at some General Quarter Sessions of the Peace, *under their hands and seals*, shall nominate and appoint some one or more discreet and skilful person or persons to be a public weighmaster or joint public weighmasters, and taster or tasters of butter, in and for such respective place of export or market-town. By the 6th section, each and every public weighmaster or weighmasters, so to be nominated and appointed, before he or they, or any of them, shall enter on the exercise of his said office, shall perfect a bond, with sufficient security, to the Justices of the Peace of such county, at the County Sessions where such public weighmaster or public weighmasters shall be so appointed and nominated, in such penalty as the said Justices shall think

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reasonable, for his or their true and faithful performance and execution of his or their office; and the said weighmaster or weighmasters shall take and subscribe, before the said Justices of the Peace, the oath of which a form is given by the Act. By the 8th section, every such weighmaster, before he takes on himself to act in the duties of his office, shall file or lodge such bond and oath respectively in the office of the Clerk of the Peace for the county in which such weighmaster shall act as such; and the said Clerk of the Peace shall give to the party so lodging such bond and oath a certificate thereof, in which shall be set forth the names and addresses of the sureties of such bond; and the oath or affirmation, so subscribed as aforesaid, shall, by such Clerk of the Peace, be kept and preserved amongst the public records of his office. By the 10th section, every person who shall act as weighmaster shall, upon the request or demand of any Magistrate or merchant or buyer of butter, produce and show the certificate of his having taken such oath, and given such security respectively. Whether Tipperary be or be not a place of export, it is a market-town; and it is not a city or town corporate.

The plaintiff in this case gave no evidence of any appointment under the hands and seals of the Justices of the Peace of the county of Tipperary. He did not prove, by production of the certificate mentioned in the Act, or otherwise, that he had entered into the bond, or taken the oath required by the statute. He did give evidence that, since the 21st of October 1859 up to the time of the commencement of the suit, he had acted in the town of Tipperary as public weighmaster of butter, and that he had taken the fees allowed by the Act, for weighing and branding casks of butter from persons bringing them to him for the purpose, and which fees, by the 17th section of the Act, are for the weighing and branding every cask of butter, two pence.

On the part of the defendant it is insisted that, though in general evidence of acting in a public office may be evidence against a wrong-doer, of title to the office, this is not applicable to a case where an issue is directly joined on the appointment, and the appointment is required to be under hand and seal. It appears

to me that the case of *M'Mahon v. Lennard* (a), and the cases cited and discussed in that case, establish that evidence of acting in a public office is evidence to go to a jury of title to that office, even in cases where the title is directly put in issue by the pleading, and though the appointment must be under seal.

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The case of *Smith v. Cartwright* (b), mainly relied on for establishing a distinction in cases where the appointment must be under seal, does not appear to me to be any authority for that distinction. In that case the plaintiff invalidated the presumption arising from his acting that he was duly appointed, by the showing of an appointment not under seal, an appointment under seal being necessary. I think that the same cases establish that evidence of acting in a public office also raises the presumption that all the formalities necessary to be completed to authorise such acting have been complied with, and that such presumption must prevail, if not encountered by evidence to the contrary. And I cannot but think that this is, in some respects, a peculiarly fit case for applying such presumption; because under the 10th section of the Act, it was competent to the defendant, who is a merchant and buyer of butter, at any time to have required the plaintiff to produce the certificate of his having entered into the bond to the parties who appointed him, and of his having taken the oath; and the bond and oath, if existing, are themselves of record in the county of Tipperary, so that no difficulty in disproving the plaintiff's title, and encountering the legal presumption, really exists in the present case. But it was then insisted that the plaintiff had himself, by his own evidence, effectually invalidated the presumption which might otherwise arise from his acting in the office. The presumption is, that no man would be guilty of the illegal act of exercising an office to which he is not entitled. But in this case it appeared that, from the year 1852 continuously down to the time of his alleged appointment in October 1859, the plaintiff had kept a weigh-house in Tipperary, had there weighed butter for buyers and sellers thereof, and had charged for such weighing a fee of three pence for each firkin of butter; there being during all that time, or the greater part of it, a public weighmaster of butter for the town, and

(a) 6 H. L. Cas. 970.

(b) 6 Exch. Rep. 927.

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the plaintiff having, by his own admission, no title to the office. In such a case it was insisted that no presumption of legal appointment could arise from the plaintiff's acts of weighing and charging fees, which were paid by the public. On this part of the case I have felt some difficulty; but, on the whole, it appears to me that there was evidence in the case, and evidence which went without objection to the jury, of an appointment, *in fact*, of the plaintiff to the office, in October 1859. So that the question raised at the close of the plaintiff's case was not so much to the evidence, as evidence of an appointment in fact, as to its being evidence of a *de jure* appointment: but once the appointment in fact, and the time of it, was evidenced, the acting subsequent to that time seems to me to be evidence of the formality of the appointment, the effect of which is not discharged by the previous unwarranted acts, though its weight may be diminished. An appointment, in fact, seems to me to have been assumed, in the examination and cross-examination of witnesses during the whole of the plaintiff's case, and the objection was not made till its close.

Secondly.—On the traverses, general and special, of the disturbance, stated in the first and second paragraphs of the plaint, the case stood thus:—There was no doubt that the defendant had, with others, opened a weigh-house for butter in the town of Tipperary; there was no doubt that he and his associates kept that weigh-house open there after the plaintiff's appointment; that they weighed butter and received the statutable fee of two pence per cask for the weighing of it. But the case on the defendant's part was this, that he and his associates, butter merchants of Tipperary, opened this as a *private weigh-house* for the weighing of butter sold to them as such butter merchants, and not for the sellers and buyers of butter generally; that the butter was weighed by *private servants* of their own, and that the payment of the sums for weighing by the sellers was a mere matter of voluntary arrangement between *them*. Whether that was true in substance and fact was the real question for the jury; and taking into consideration that it pretty clearly appeared that the only condition on which sellers of butter could deal with twelve of the principal butter merchants in Tipperary,

was that those sellers should not weigh the butter at the public weigh-house, but should weigh it at the defendant's weigh-house, and that they should pay to the defendant and his associates a fee equal in amount to that payable under the statute to the plaintiff, I cannot say that I think the jury gave a verdict against the weight of evidence on these issues.

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As to the traverse of the disturbance, by the defendant's employment of servants to prevent persons from going to the plaintiff's weigh-house, the case stood thus:—There was clear evidence of the establishment of the defendant's weigh-house, as a rival to the weigh-house kept by the plaintiff previous to the plaintiff's appointment. There was evidence of the employment by the defendant of the means stated in the third paragraph, previous to the plaintiff's appointment; as to whether the means were or were not employed subsequently, there was contradictory evidence. Under all the circumstances of the case, it does not appear to me that on that contradictory evidence the jury might not have reasonably found as they did; and if so, the verdict ought not to be set aside as against the weight of evidence.

Thirdly; the 2nd section of the Act 52 G. 3, c. 134, already in part stated, enacts "That in every city and town corporate in Ireland (except the city of Cork), the Chief Magistrate and Aldermen, under the seals of their respective corporations, and in *every seaport or place of export* from whence butter is commonly *shipped* for exportation from Ireland, such place being no city or town corporate, and in every market-town where butter is bought or sold or exposed to sale for the purpose of trade, the Justices of the Peace for the county or counties in which the seaport or place of export and market-town respectively lie, at some General Quarter Sessions of the Peace, under their hands and seals, shall nominate and appoint some one or more discreet and skilful person or persons to be a public weighmaster or joint public weighmasters and taster or tasters of butter, in and for such respective city, town corporate, place of export or market-town."

The 15th section enacts that all and every cask or casks of butter which shall be brought into any city or liberty thereof,

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town corporate, seaport, or place of export, or market-town, shall before the same is sold or exposed to sale in or exported from said city or liberty thereof, town corporate, or place of export or market-town, be brought to some one of the weigh-houses aforesaid, there to be tested, weighed and proved by said weighmaster or weighmasters, taster or tasters of said city, town corporate, seaport or place of export or market-town (as the case may be), who is and are duly required, strictly, according to their respective offices, to inspect the same, and, before the shipment on board, to approve the same, to see that such butter be merchantable.

Now I can have no doubt the first of these sections clearly deals with three distinct classes of places; first, cities and towns corporate; secondly, seaports or places of export, from whence butter is commonly shipped for exportation from Ireland, not being cities or towns corporate; and thirdly, market-towns where butter is commonly sold or exposed to sale for the purpose of trade, and that "places of export" from whence butter is commonly shipped for exportation is used as a more general term than seaport, and as including it; and consequently, where "places of export" is used in that and the subsequent parts of the Act, it is that same general term indicating a class where it first occurs.

I agree with the Counsel for the defendant, that "place of export" does not of itself necessarily import a place of shipment, but that any place from which goods or wares are directly sent out of a country for the purpose of traffic, to another country, is a place of export; and I am disposed to think that, in that view, the evidence in the case does show that Tipperary is a place of export; but I can have no doubt that a place of export from which goods are commonly shipped for exportation, as distinct from a market-town in which goods are sold or exposed to sale for the purpose of trade, is a place of export, which is also a place of shipment, and that Tipperary is not such.

The 7 & 8 G. 4. c. 61, recites that, by the Act of 52 G. 3, it is amongst other things enacted, that public weighmasters of butter shall in the manner therein mentioned be appointed in and for every city, town corporate, place of export, or market-town in Ireland,

from which butter is commonly shipped for exportation, or where butter is bought or sold, or exposed to sale for the purpose of trade, and that all and every cask or casks of butter which shall be brought into any city, or liberty thereof, town corporate, seaport, or place of export or market-town, for sale or for exportation, shall, before the same is sold, or exposed to sale, or exported from such city, town corporate, seaport, or place of export or market-town, be brought to some one of the weigh-houses in the said Act last mentioned, there to be branded, weighed and proved, in manner required by the said Act, by the said weighmaster or weighmasters, taster or tasters of such city, town corporate, seaport, or place of export or market-town, as the case may happen to be; who is and are by the said Act required, strictly, according to their respective offices, to inspect the same, and, before he or they mark or brand or approve of same, to see that such butter be marketable. This, it will be observed, is a substantial recital of the 2nd and 15th sections of the Act 52 G. 3. The Act then recites, that it is expedient, to alter and amend the Act as after recited; and accordingly it enacts that so much of the recited Act as relates to the appointment of tasters of butter in any city, town corporate, or market-town in Ireland, not being a seaport or place of export, and as relates to the duties to be performed by such tasters of butter in any such city, town corporate or market-town, not being a seaport or place of export, and as relates to the tasting and proving of casks of butter within any such city, town corporate, borough or market-town as aforesaid, not being a seaport or place of export, shall be, and the same is, hereby repealed.

It seems to me matter of necessary construction here that seaport or place of export must denote the class mentioned in the 2nd section of the Act of G. 3, distinct from city, town corporate and market-town where butter is exposed to sale, and, if so, must mean a place of shipment. If that be so, the office of taster is abolished in Tipperary, which is not a place of shipment, and the direction of the learned Judge at the trial was wrong.

I agree that this construction of the Act of Parliament is confirmed, if confirmation were necessary, by a comparison of the 20th section of

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 against the plaintiff's order ought to be disallowed with costs, and that the cause shown by the plaintiff against the defendant's order ought to be allowed with costs.

HUGHES, B., concurred.

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A parol license to do an act on the lands of the licensee, which but for the license would be wrongful, and may be injurious to the licensor, is not revocable after expense incurred on the faith of it, at all events without putting the licensee in *statu quo*.

Nor, *semble*, will it make any difference that such an act is to be done partly on the lands of the licensor, and partly on those of the licensee. Where a plaintiff stated a cause

of action for consequential damage arising from an act done on land other than the plaintiff's, and, in a replication, the act was alleged to have been done partly on the lands of the plaintiff:—*Held*, that this was a departure which was the subject of general demurrer.

THIS was an action for injuries to the plaintiff's land, caused by the raising of a weir. The first paragraph of the summons and plaint complained, "That before, &c., the plaintiff was the owner and occupier of the lands of Curragh, in the county of Cork, on which were standing several growing plantations, along a part of which said lands there flowed a certain stream called the 'Allea,' which of right should, and still of right ought to, flow by the said lands, without flooding or injuring the same, or the plantations thereon; and that the defendant obstructed the said stream, by raising a certain weir across the said river, to a height much greater than its ordinary level, and thereby caused the water of the said stream to flood the said lands and plantations of the plaintiff; and the plaintiff frequently called upon the defendant to remove the said obstruction, by lowering the said weir to its ordinary and rightful level; but the defendant wrongfully kept and maintained, and still continues to keep and maintain, the said weir at a height much greater than its ordinary and rightful level, causing thereby

* *Coram* FITZGERALD and HUGHES, BB.

" the said lands and plantations of the plaintiff to be flooded, whereby
 " they have sustained great injury, to the damage," &c. T. T. 1860.

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Defence.—" That the plaintiff, heretofore, to wit, on the 18th
 " day of May 1858, impleaded the defendant in her Majesty's Court
 " of Common Pleas in Ireland, and complained, in the first count of
 " the summons and plaint, in the said last-mentioned action, that
 " he, the said plaintiff, was the owner and occupier of the lands of
 " Curragh, in the county of Cork, being the lands in the summons
 " and plaint in this action mentioned, on which were standing
 " several growing plantations, along a part of which said lands
 " there flowed a certain stream called the 'Alloo,' which of right
 " flowed, and still of right ought to flow, by the said lands, without
 " flooding or injuring the same, or the plantations thereon; and
 " that the defendant wrongfully obstructed the said stream, by
 " raising a stone weir across the said stream, close by the plaintiff's
 " lands, and thereby raised the level of the said stream, above the
 " said weir, to a height much greater than its ordinary and rightful
 " level. And, in the second count of the writ of summons and
 " plaint, in the said last-mentioned action, the plaintiff complained
 " that he was the owner and occupier of the lands of Curragh in the
 " county of Cork, being the lands in the writ of summons and
 " plaint in this action mentioned, on which were standing several
 " growing plantations, along a part of which said lands there
 " flowed a certain stream called the 'Alloo,' across which, close
 " to the plaintiff's said lands, there was a stone weir, for the
 " purpose of turning off a portion of the water of the said stream
 " to a neighbouring mill, and, notwithstanding which said weir,
 " the water of the said stream of right flowed and still of right
 " ought to flow, by the plaintiff's said lands without flooding or
 " injuring the same or the plantations thereon, and that the
 " defendant wrongfully raised the said stone weir beyond its proper
 " height and position, so as to cause a flood of water to flow
 " over the said lands and plantations, and that the
 " plaintiff, in consequence thereof, has sustained great damage and
 " injury, to the damage, &c."

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 " leave; and thereupon an issue was, in due form of law, joined
 " between said parties, whether the acts complained of in the said
 " action were respectively done by the leave of the plaintiff; and
 " such proceedings were afterwards had in the said action, that the
 " same came on for trial before the Hon. Judge O'Brien, and a jury
 " of the county of Cork, to be tried at the Assizes held for the
 " county of Cork, to wit, on the 27th day of July 1858; and the
 " said jury found, upon said issue, that the defendant did the re-
 " spective acts complained of in the writ of summons and plaint in
 " the said former action by the plaintiff's leave; whereupon, after-
 " wards, and before the commencement of this suit, it was consi-
 " dered, in and by the said Court, that the plaintiff should take
 " nothing by his writ in the said former action, as by the record of
 " the said proceedings and judgment may appear, which said judg-
 " ment still remains in full force, and unreversed; and so the
 " defendant avers the said raising of said weir, and the obstruct-
 " ing of the said stream thereby, being the acts complained
 " of in said former action, were done by the said plaintiff's
 " leave, as by said record conclusively appears; and the de-
 " fendant avers that the said weir and said river Alloa, men-
 " tioned in the writ of summons and plaint in the said former
 " action, is the same weir and river Alloa which are mentioned
 " in the writ of summons and plaint in this action; and that the
 " lands of the plaintiff, mentioned in the former writ, are the
 " same lands as those mentioned in the present writ; and that
 " the raising of the said weir, and obstructing said stream, thereby
 " complained of in said former action as aforesaid, were the same
 " raising of the said weir and obstructing the said stream thereby
 " mentioned in the writ of summons and plaint in this action, and
 " were so done by the leave of the plaintiff, as aforesaid. And the
 " defendant further avers, that the said weir was so raised by him
 " for the purpose of supplying a certain mill of the defendant with
 " a more abundant supply of water from the said stream, for the
 " purpose of working the said mill; and that, upon the faith of the
 " said license so granted by the plaintiff as aforesaid, the defendant

"expended large sums of money, amounting to the sum of £200, in
 "raising the said weir, and also in improving and altering the said
 "mill, and in providing additional and improved machinery adapted
 "for such increased supply of water for the working of the said
 "mill; and, therefore, the said defendant refused to lower the said
 "weir, and kept and maintained, and still keeps and maintains,
 "same at the said height to which he, by the said license of plaintiff,
 "raised same as aforesaid, as he lawfully might, for the cause afore-
 "said, which are," &c.

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Replication.—"That the weir in said first defence mentioned
 "was in part situate on the lands of the plaintiff, and that the leave
 "and license in the said first defence mentioned was by parol only;
 "and that before the commencement of this suit the plaintiff re-
 "voked the same, as he lawfully might."

By way of further replication—"That the weir in said first defence
 "mentioned was in part situate on the lands of the plaintiff, and
 "that the leave and license in the said first defence mentioned was
 "by parol only; and that before the commencement of this suit the
 "plaintiff revoked the same, as he lawfully might, and offered to
 "pay the defendant all expenses he had incurred in raising the
 "level of the said weir, and also all necessary expenses he might
 "incur in lowering the same to its ancient and rightful level."

To these replications the defendant demurred.

The principal points noted for argument were, that the replica-
 tions showed no lawful revocation of the license stated in the defence;
 and that they were founded upon matter which was a departure
 from the ground of complaint stated in the summons and plaint.

H. P. Jellett, with *H. E. Chatterton*, in support of the demurrer.
J. Collins, with *E. Sullivan*, contra.

The following cases were cited, as to the effect of the license:
Winter v. Brockwell (a); *Liggins v. Inge* (b); *Wood v. Lead-*
bitter (c); *Sury v. Pigot* (d); *Hewlins v. Shippam* (e); 2 *Saund.*,

(a) 8 East, 302.

(b) 7 Bing. 682.

(c) 13 M. & W. 838.

(d) 1 Poph. 166.

(e) 5 B. & C. 222.

T. T. 1860. p. 113 *b*; *Wood v. Manley* (a). As to the distinction between case and trespass, existing since the Common Law Procedure Act: *Fay v. Prentice* (b); *Common Law Procedure Act*, 1853, s. 81. Upon the question of departure: 2 *Saund.*, p. 84 *a*; *Com. Dig.*, tit. *Pleader*, F, 10.

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Cur. ad. vult.

FITZGERALD, B.

In this case the plaintiff complains that he was the owner and occupier of certain lands called Curragh, in the county of Cork, on which were standing several growing plantations, and along a part of which lands flowed a stream, which of right ought to flow by the lands without flooding them or the plantations thereon; and that the defendant obstructed the said stream, by raising a weir across the said stream, to a height much greater than its ordinary level, and thereby caused the water of the said stream to flood the lands and plantations of the plaintiff, who frequently called upon the defendant to remove the said obstruction, by lowering the said weir to its ordinary level. Yet the defendant, well knowing the premises, refused to lower the weir to its ordinary level, but wrongfully kept and maintained, and still keeps and maintains, the said weir at a height much greater than its ordinary and rightful level, causing thereby the said lands and plantations of the plaintiff to be flooded thereby, whereby they had sustained great injury, to the plaintiff's damage, &c. That a declaration in this form would, previously to the Common Law Procedure Act, have been a declaration in case, for consequential damage, and not in trespass, cannot, I think, be doubted. But the Act having abolished the forms of actions, the form cannot be relied on for the purpose of ascertaining the cause of action alleged. It is, however, essential, as well since the Common Law Procedure Act as before, that the plaint should disclose a cause of action, though the form in which it is disclosed be immaterial: and thus, though the distinction between actions of trespass and case be done away, the distinction between trespass, or direct injury to property, and consequential damage, as causes of

(a) 11 Ad. & Ell. 34.

(b) 1 C. B. 829.

action remains unaffected. This plaint does disclose a cause of action, but that cause of action is not trespass, as it would be if it had averred that the weir was on the soil of the plaintiff, and a part of his freehold. This is not averred, and it cannot be intended. On the contrary, the intendment seems to me to be, that the weir which was raised by the defendant, which the defendant might have lowered, and which the defendant was called on to lower, was his own weir, and on his soil. The cause of action, therefore, stated in the plaint is the consequential damage arising from the defendant having raised on soil, not the soil of the plaintiff, an obstruction to the ordinary flow of the stream mentioned, by the plaintiff's land.

To this, which is, I apprehend, the correct view of the plaint, the defence is applied. It states a previous action brought by the plaintiff against the defendant, for obstructing the flow of water by the plaintiff's land, by raising a weir across the stream, *close to the plaintiff's land*; that in that action the defendant pleaded a license for the plaintiff so to raise the weir; and that, upon issue joined, there was a verdict for the defendant, and judgment accordingly. Then the defence avers, that the raising of the weir and the obstructing of the stream thereby, being the acts complained of in the former action, were done by the plaintiff's license; and that the weir and stream mentioned in the said former action are the same weir and stream which are mentioned in the plaint in this action; that the lands of the plaintiff, mentioned in that action, are the same lands which are mentioned in this; and that the raising of the weir and obstructing the said stream, complained of in the former action, are the same raising of the weir and obstructing of the stream thereby complained of in this action, and were so done by the leave and license of the plaintiff. The defence further avers, that the weir was so raised for the purpose of supplying a mill of the defendant with a more abundant supply of water; and that upon the faith of the license he expended large sums of money in raising the weir and altering the mill, and providing additional and enlarged machinery adapted to such increased supply of water; and that, therefore, he refused to lower the weir, and still keeps and maintains it at the height to which he raised it by the plaintiff's license. This defence

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is founded on authorities cited in the argument, which establish that a parol license given to do an act on the licensee's own land, which would, *prima facie*, be a lawful act, independently of the license, but which might, from circumstances, be attended with injurious consequences to the licensor, cannot be countermanded, if the act be done and completed and expense incurred on the part of the licensee; or that, at least, the licensor cannot insist on the removal of what has been done, without putting the licensee in *status quo* as to the expenditure incurred.

To this defence a replication was filed by the plaintiff, which avers that the weir in the defence mentioned is partly on the lands of the plaintiff, and that the license mentioned in the defence was by parol only; and that, before the commencement of the suit, the plaintiff revoked the same, as he lawfully might; and in a second replication, it is further alleged that the plaintiff offered to pay all the expenses which defendant had incurred in raising the level of the weir, and also all expenses he might incur in lowering the same. The main object of the replication is manifestly to take the case out of the authorities relied on, by suggesting that the act licensed was done, at least in part, on the plaintiff's land.

To this replication the defendant demurred. Supposing the case to be within the authorities relied on by the defendant, and that a tender of the expenditure incurred by the defendant would sustain the countermand of his license, it is not pretended that any sufficient tender is here pleaded; and what was merely insisted on was, that the weir being in part on the plaintiff's land, the license was so far to do an act which takes its whole lawfulness from the license, and is countermandable, being by parol only, notwithstanding the expense incurred on the faith of it. I am not at all prepared to say that the fact, if so, that the weir licensed to be raised was, *in part*, on the plaintiff's land, would take the case out of the authorities relied on; but the argument, at all events, is answered, as I think, successfully, that the averment of the replication, supposing it admissible, would be satisfied if a single part of the weir, an inch in extent of the weir, was on the plaintiff's land, though wholly outside any part of the weir raised so as to form an obstruction to the

stream; so that the replication does not show that the act licensed was to be done, or was done, on the plaintiff's land at all. T. T. 1860.

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It is further answered, that even if this were otherwise, the plaintiff cannot be allowed, in a plea of confession and avoidance, indirectly to traverse the allegation in the defence, that the weir close to (not on) the plaintiff's land, the raising of which was the subject of the former action, are the same weir and the same raising which are the subject of this; then, as the demurrer admits nothing which is not sufficiently pleaded, it cannot be taken to admit the improper allegation, nor can the replication be sustained as both a pleading by way of traverse and in confession and avoidance. This answer also seems to me well founded. That being so, it seems unnecessary to consider the further answer, that the cause of action relied on by the plaintiff is wholly consequential damage; whereas, if part of the weir were on the plaintiff's soil, the replication would show a cause of action so far in trespass, and that consequently there would be a departure. I may, however, observe that the well known case of *Farran v. Beresford* (a) seems a conclusive authority that the objection of departure may be taken on general demurrer. On the whole, I am of opinion that the demurrer should be allowed.

HUGHES, B.

I quite concur with my Brother FITZGERALD, and there is only one observation that occurs to me as necessary to be added. The question raised by the demurrer to the second replication was not argued, and I understand that it was in point of form given up; I, therefore, offer no opinion as to the sufficiency of the tender of amends. With respect to the other question, I think that any person reading the summons and plaint can entertain no doubt that the cause of action there stated is for consequential damage, caused by the erection of the weir referred to. It appears to me, from the form of the pleadings, that the defendant has a right to read the summons and plaint as if the weir was not upon, but close to, the plaintiff's lands. The effect would be to involve the

(a) 10 Cl. & Fin. 319.

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plaintiff in a special averment that the weir was not upon his land, but close to it. Should he then be allowed to aver, as he has done in his replication, that the weir was in part upon his own land? I think he should not be allowed to aver in his replication the direct negative of a material averment in his summons and plaint. I, therefore, am of opinion that the demurrer should be allowed.

Demurer allowed.

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May 8.

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To an action for wrongfully keeping and maintaining a weir at a height beyond its ordinary level, whereby plaintiff's lands were flooded, the defendant pleaded that he "did not wrongfully keep and maintain the weir at a height greater than its ordinary level." The issue followed the words of the defence.—*Held*, that the plea only put in issue the fact of the maintenance of the weir, and that evidence on behalf of the defendant, that such maintenance was rightful, was inadmissible.

THIS was an action for injuries to the plaintiff's land, caused by the raising of a weir. The plaintiff, in the first paragraph of the summons and plaint, complained that "Plaintiff was the owner and occupier of the lands of Curragh, in the county of Cork, on which were standing several growing plantations, along a part of which said lands there flowed a certain stream called the "Allea," which of right flowed, and still of right ought to flow, by the said lands, without flooding or injuring the same, or the plantations thereon; and that the defendant obstructed the said stream, by raising a certain weir across the said river, to a height much greater than its ordinary level, and thereby caused the water of the said stream to flood the said lands and plantations of the plaintiff; and the plaintiff frequently called upon the defendant to remove the said obstructions, by lowering the said weir to its ordinary and rightful level; yet the defendant, well knowing the premises, refused to lower the said weir to its ordinary and rightful level, but wrongfully kept and maintained, and still continues to keep and maintain, the said weir at a height much greater than its ordinary and rightful level, causing thereby the said lands and plantations of

* Before FITZGERALD and HUGHES, BB.

"the plaintiff to be flooded, whereby they have sustained great E. T. 1860.
 "injury, to the damage," &c. *Eschequer.*

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The second count complained of a breaking and entry. To the first count the defendant pleaded a special plea, setting forth the proceedings in a former action between the same parties, in which a jury had found that the acts then complained of (which the defendant averred to be the same as those complained of in the present action) were done by the leave and license of the plaintiff; and the defence then averred "That the said weir was so raised for "the purpose of supplying a certain mill of the defendant with a "more abundant supply of water from the said stream, for the purpose of working the said mill; and that, upon the faith of the "said license so granted by the plaintiff as aforesaid, the defendant "expended large sums of money, amounting, to wit, to the sum of "£200, in raising the said weir, and also in improving and altering "the said mill, and in providing additional and improved machinery "adapted for such increased supply of water for the working of the "said mill; and, therefore, the said defendant refused to lower the "said weir, and kept and maintained, and still keeps and maintains, "same at the said height to which he, by the said license of plaintiff, "raised same, as aforesaid, as he lawfully might, for the cause aforesaid; which are," &c.

Second defence to the first count:—"That the defendant did not "wrongfully keep or maintain, or does he keep or maintain, the said "weir at a height much, or at all, greater than its ordinary or right- "ful level, as in said first count alleged." Third defence to the first count:—"That after the weir, in the said first count mentioned, "had been so raised, by the license of the plaintiff, in the said first "defence stated, the several statements in respect to which license, "contained in said first defence, the defendant, in order to avoid "prolixity, prays may be deemed incorporated in this defence, as if "the same were herein again repeated, the plaintiff revoked the said "license so given by him, as aforesaid; and that, thereupon, the "defendant, within a reasonable time after the said license was so "revoked, lowered the said weir to its ordinary and rightful level, "and has ever since kept and maintained the said weir so lowered,

E. T. 1860. "and at its said ordinary and rightful level." The defence to the
Exchequer.
 second count was a traverse of the breaking and entry.
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 KELLER. The plaintiff filed several replications to the first defence, to
 which a demurrer was taken, on the part of the defendant.

See the report of the case on demurrer, *ante*, p. 124. Upon the other pleadings the following issues in fact were settled:—First: whether the defendant wrongfully maintained the said weir, in the summons and plaint mentioned, at a height much greater, or at all above, its ordinary or rightful level?

Second.—Whether the defendant lowered the said weir to its ordinary or rightful level, as in the said third defence mentioned?

Third.—Whether the defendant broke and entered the lands of the plaintiff, in the second count mentioned, and dug and removed gravel from any portion of the bed of the river, in the second count mentioned, being part of the lands of the plaintiff?

At the trial, before O'Brien, J., at the Summer Assizes for the county of Cork, the plaintiff was examined as a witness on his own behalf, and proved the raising of the weir by the defendant. He also proved a notice, of the 6th of May 1859, served by him on the defendant, requiring him to lower the weir; and he swore that it had not been lowered to its ordinary and rightful level. Similar testimony was given by several other witnesses; and the plaintiff also gave in evidence an attested copy of the judgment and record of the former trial between the same parties.

In support of the defendant's case, the defendant himself was examined; and he deposed that he had raised the weir in the year 1856, at the desire of the plaintiff, and with his permission. He also swore that he again lowered the weir to its old level, in consequence of a notice he received from the plaintiff, dated the 3rd of May 1859, and that the weir, as so lowered, was not higher in any part than it was in 1858, when he came into possession. Counsel for the defendant then asked the witness "whether he had expended any and what sum on improvement of his premises since 1856, on the faith of the permission given him by the plaintiff to raise the weir?" This question was objected to by the plaintiff's Counsel. His Lordship, however, admitted the evidence; and Counsel for the

defendant excepted to this ruling. The defendant then swore that he had expended a sum of £100 in improving and providing improved machinery for his mill since 1866, on the faith of the leave given him by the plaintiff to raise the weir. The jury found in favour of the defendant upon all the issues joined.

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J. Collins, in support of the bill of exceptions.

Evidence of the defendant's expenditure, upon the faith of the license given by the plaintiff, was not admissible upon this record. It was contended at the trial that it was admissible, upon the ground that the first issue was "whether the defendant *wrongfully* maintained the weir," &c., and that under that the defendant might show he maintained it "rightfully." But that is not so. The plea here is a simple traverse—"that the defendant did not wrongfully keep or maintain, or does he keep or maintain, the said weir at a height much, or at all, greater than its ordinary or rightful level." Upon that pleading, evidence of a justification is not admissible. The 71st section of the Common Law Procedure Act 1853 enacts that, "in actions for wrongs, defences by way of denial shall take issue on some one or more than one material matter of fact alleged in the summons and plaint, and all defences which admit the matter complained of, but rely on matter of avoidance, excuse or justification, shall be so expressly pleaded." The plea does not allege any matter of justification, and puts in issue only the fact of the maintenance of the weir: *Cantwell v. Cannock* (a). If this case were in England, and not guilty were pleaded, no evidence of justification would be admissible. In an action for obstructing a right of way, the plea of not guilty operates as a denial of the obstruction only, and not of the plaintiff's right of way: 1 *Taylor on Ev.*, s. 275; *Frankum v. Earl of Falmouth* (b); *Ward v. Robins* (c). The plea of not guilty, therefore, in this case would not put in issue the wrongfulness of the act done, but only the fact whether the weir was raised or lowered. The addition of the word "wrongfully" to the plea and issue would not let in evidence of

(a) 3 Ir. Com. Law Rep. 78; S. C., 6 Ir. Jur. 151.

(b) 2 Ad. & Ell. 452.

(c) 15 M. & W. 287.

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justification. The policy of the Common Law Procedure Act was to narrow the issues between the parties; but the effect of the argument at the other side would be to allow the defendant to prove a double case on this single issue. If the evidence of justification was improperly admitted, we are entitled to a new trial: *Baron De Rutzen v. Farr* (a); *Crease v. Barrett* (b); *Wright v. Doe d. Tatham* (c). If evidence of justification were admissible, the evidence tendered was not evidence of justification. A valid right to raise and maintain the weir in this case could only be acquired by deed, and the license proved was a parol one, which conferred no title, and was revocable, although the defendant may have incurred some expense upon the faith of the license: *Rex v. The Inhabitants of Hamdon-on-the-Hill* (d); *Fentiman v. Smith* (e); *Hewlins v. Shipham* (f); *Wood v. Leadbitter* (g). There are decisions in which a contrary principle appears to be established: *Winter v. Brockwell* (h); *Liggins v. Inge* (i). These cases are distinguished, upon the ground of the license being to do an act on the land of the licensee; and that where a license is given to a party to use his own land, in opposition to an easement which the grantor is entitled to, it cannot be revoked after expense incurred by the licensee in carrying out the license.

H. P. Jellett, with *R. Lane* and *H. B. Chatterton*; contra.

The first count of the summons and plaint is one which, according to the old forms, would be a count in case. It states an act rightful in itself, done to something not the plaintiff's property, but which results in injury to the property of the plaintiff. A defence has been pleaded to that count, on which issue was taken. The question now is, what is the meaning of that defence, not whether it is good. In *Lumby v. Allday* (k), which was an action of slander, the parties went to trial on a matter which the Court held was not

(a) 4 Ad. & Ell. 53.

(c) 7 Ad. & Ell. 330.

(e) 4 East, 107.

(g) 13 M. & W. 838.

(i) 7 Bing. 682.

(b) 1 Cr., M. & R. 919.

(d) 4 M. & S. 562.

(f) 5 B. & C. 222.

(h) 8 East, 302.

(k) 1 Cr. & Jer. 301.

the subject of an action at all; but as the general issue had been pleaded, and issue taken, the Court held that the only question was whether the facts stated in the count existed, and not the legal effect of those facts. This plea involved two issues, one whether the defendant did the act, and the other whether he did wrongfully. In *Brennan v. Williams* (a) this Court decided that a plea that the defendant did not, maliciously or without reasonable or probable cause, assault the plaintiff, put in issue the fact of the assault, and the malice, and set the plea aside on that ground. That case was followed by the Court of Queen's Bench, in *Smith v. Whelan* (b).—[FITZGERALD, B. What issue in fact is involved in the word "wrongfully?"].—That the defendant, in constructing the weir, was not a wrong-doer. Wrongfulness is a mixed question of law and fact.—[FITZGERALD, B. It is not a plea putting in issue two facts, but it is a plea capable of two meanings.]—*Brennan v. Williams* and *Smith v. Whelan* are express decisions that two facts are put in issue by such a plea. If the evidence is admissible, it is evidence of justification. The authorities cited are cases in which the act was to be done on the land of the licensor; but where the act is to be done on the land of the licensee, expenditure on the faith of a parol license makes it irrevocable: *Winter v. Brockwell* (c); *Liggins v. Inge* (d).

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E. Sullivan, in reply.

The word "wrongfully" in the plaint conveys nothing. It would be good without it, and it adds nothing to the cause of action. *Frankum v. Earl of Falmouth* (e) is precisely in point, and no attempt has been made to distinguish it. It is a mistake to call in aid of the defendant's case the decisions in actions for doing a thing maliciously and without reasonable and probable cause. The plaint in those actions would be bad without the word "maliciously;" but the word "wrongfully," in an action of *tort*, means nothing

(a) 9 Ir. Com. Law Rep., App. xxxv.

(b) 10 Ir. Com. Law Rep., App. xvii.

(c) 8 East, 302.

(d) 7 Bing. 682.

(e) 2 Ad. & Ell. 452.

E. T. 1860. more than that I have an action of *tort* against you. The question
Exchequer. sought to be put was inadmissible, as leading to a new collateral
 BLOOD inquiry, and not affecting the issue: *Tennant v. Hamilton* (a).
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FITZGERALD, B.

We are of opinion that this exception must be allowed. The plaintiff complains of an act attended with certain injurious consequences, and that act he qualifies in his pleading as "wrongful." The defendant denies he wrongfully did the act complained of. He only denies the act qualified in the plaint. That does not enable the defendant to show that he did it rightfully. The case is not affected by any of the authorities cited.

If this plea were ambiguous, whether it means to deny the doing of the act, or the character of the act done, the Judge was bound to put that meaning on it which would make it consistent with the 71st section of the Common Law Procedure Act.

HUGHES, B., concurred.

(a) 7 Cl. & Fin. 122.

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 Nov. 22.

REILLY v. WHITE.

In an action for work and labour, by an agent against his employers, it appeared that the action was brought for agency commission, and that the contract was made in England, and the services rendered in Ireland. *Held*, that the performance of the work in Ireland was such a material part of the cause of action as enabled the Court to substitute service.

THIS was an application on the part of the plaintiff, Michael Joseph Reilly, to make absolute a conditional order of the 30th of October, substituting service of the writ of summons and plaint on John Little, as the agent of the defendants, Messrs. White & Fairchild, merchants, residing in London. The action was brought to recover

The defendants, who were coffee merchants, issued advertisements in which they announced that J. L. was their agent for Belfast. It appeared that J. L. was in communication with them.—*Held*, that J. L. was the agent of the defendants, within the meaning of the 34th section of the Common Law Procedure Act 1853.

a sum of £160, claimed by the first paragraph of the summons and
plaint to be "payable by the defendants to the plaintiff, for the
"work and labour, care and diligence, journies and attendances of
"the plaintiff, heretofore done, performed and bestowed, as the
"broker and agent of the defendants, in and about the selling and
"disposing of, and endeavouring to sell and dispose of, divers goods,
"chattels and effects of the defendants, at their request, and in and
"about other the business of the defendants, and for them, and at
"their request."

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The order for substitution of service was obtained upon the affidavit of the plaintiff, which stated that the defendants resided in London, and carried on their business of coffee-merchants at Nos. 107, 108, 109 and 110 High-street, Borough, Southwark, London. That the action was brought for commission moneys and expenses due to the plaintiff, as agent in Ireland of the defendants, for the sale throughout Ireland of their coffees, and that the cause of action arose within the jurisdiction. That John Little, of Nos. 1 and 3 North-street, Belfast, was, and for some time had been, the agent of the defendants, for the sale of their coffee goods in Belfast, and was described as such agent in the printed hand-bills issued by them; and that he was in constant communication with the defendants, and that any document served upon him would be forthwith transmitted to the defendants.

The order for substitution of service having been made, service was effected on John Little; and, on the 8th of November, an application, as on behalf of John Little, was made to the Court, to extend the time for showing cause against the conditional order. On the same day, the attorney instructed by the defendants wrote to J. Little as follows:—"SIR—We have been instructed by Messrs. "White & Fairchild to defend them in this action, and this day
"applied to the Court on your behalf, and obtained a week's time
"to show cause against the conditional order with which you were
"served, as it is Messrs. White & Fairchild's desire, if possible, to
"have the case tried in London, and not in Dublin; we will, there-
"fore, thank you to let us know, by return of post, if you con-
"sider yourself at all agent for Messrs. White & Fairchild, and

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"by your sending us one of your printed hand-bills. If you do not consider yourself agent, we will be able effectually to show cause against its being made absolute." J. Little replied that the defendants could not take that defence, as he was their regularly appointed agent for Belfast.

On the 12th of November, Joseph White, one of the defendants, made an affidavit, as cause against the conditional order, in which he stated that Little was only his customer, and simply an agent for the sale of a certain description of his goods in Ireland, and that he was not their special nor general business agent. That the cause of action arose in England, the contracts between him and the plaintiff being made in England, and one of those contracts being in fact terminated in England, and the other terminated from England.

Affidavits in reply were made by J. Little and the plaintiff. J. Little stated the letters of the 8th and 9th November, set out above, and swore that he had, for upwards of two years, been agent to the defendants in Belfast, for their patent concentrated coffee, and still acted as such; and he referred to a hand-bill of the defendants, subscribed at foot, "Agent for Belfast, J. Little, wholesale grocer, North-street." The affidavit of the plaintiff alleged that the contract was concluded in Ireland, and that the services, the subject-matter of the action, were performed in Ireland, and not elsewhere.

D. C. Heron (with him *W. D. Andrews*), in support of the motion, contended, first, that the performance of the work by the plaintiff in Ireland was such a material part of the cause of action, that the Court had jurisdiction to substitute service. Secondly; that Little was the agent of the defendants, within the meaning of the 34th section of the Common Law Procedure Act 1853. He cited *Betham v. Fernis* (a); *Kett v. Robinson* (b); *Frew v. Stone* (c); *Kisbey v. Chester and Holyhead Railway Company* (d); *Watson v. Atlantic Steam Navigation Company* (e); *Powell v. Atlantic Steam Navigation Company* (f).

(a) 4 Ir. Com. Law Rep. 92.

(b) *Ibid*, 186.

(c) 6 Ir. Jur. 287.

(d) 2 Ir. Jur., N. S., 330.

(e) 10 Ir. Com. Law Rep. 163.

(f) 10 Ir. Com. Law Rep., App. xlvii.

C. Pallas, contra.

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To enable the Court to substitute service, the cause of action must appear to have arisen within the jurisdiction. That will not be established merely by the swearing of the defendant. The plaintiff sues on the general *indebitatus* count. That which constituted the contract was the request of the defendants, and that occurred in England. Performance of that contract by the plaintiff, in Ireland, cannot give him a cause of action here. In *Powell v. Atlantic Steam Navigation Company*, and *Kisbey v. Chester and Holyhead Railway Company*, there was a contract by the defendants to deliver in Ireland, which was broken in Ireland. Little is not the agent of the real or personal estate of the defendants; he is merely their customer, getting a commission on his sales.

W. D. Andrews, in reply.

PIGOT, C. B.

I think we ought to make this order absolute. There are two questions with which we have to deal; one, whether Little is the agent of the defendants; and the other, which I should have placed first, whether the cause of action arose within the jurisdiction. We have an exposition of this Act of Parliament, made in successive decisions in the Courts of Law in this country, that, if part of the cause of action has arisen within the jurisdiction, the Court may substitute service. We must, therefore, now read the Act as if the words were, "the cause of action, or any part thereof." By "any part" I mean "any substantial part." Did any part of the cause of action in this case arise within the jurisdiction? What are the facts? The plaintiff swears that the ground of his action is, that he was employed by the defendants, to act for them in the sale of goods in Ireland; and his demand is for commission on those sales, and for expenses incurred in reference to the conduct of that business. In the present instance, the action is the ordinary one of *indebitatus assumpsit*, for services performed and money paid; and the question is, whether any part of that cause of action arose in Ireland. I think that the performance of the work, which is to earn

M. T. 1860. the money, is a part, and an essential part, of the cause of action;
Exchequer. and suppose the contract were to be treated as a part of the domicile, and the *lex loci* of the place where it was made were to govern it, I should still be sorry to hold that, therefore, no part of the cause of action arose in that country where the services were to be done which were to earn the payment.

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The next question is, was the person served an agent of the defendants, within the meaning of the Act? A defendant, I am clearly of opinion, is entitled to come into Court to contest the jurisdiction, and his appearance for that purpose cures no defect; but with a view to the person served being his agent, I should require some consideration before I could come to the conclusion that his appearance would not have cured the defect. In a vast variety of cases, even proceedings *in pœnam*, appearance has been held to cure such a defect. In *Levy v. Duncombe* (a), a rule *nisi* had been obtained, at the instance of the plaintiff, for an attachment against his late attorney, for not having delivered a bill of costs, pursuant to a Judge's order for that purpose, and which had been made a rule of Court, and personally served. It was objected that the rule could not be made absolute, because the affidavit of service did not state that the rule *nisi* had been personally served. Lord Abinger said—"The rule *nisi* is served merely for the purpose of bringing the party here; if he appears, as he does here, by his Counsel, that obviates the necessity of inquiring whether the service of the rule *nisi* was personal or not; though, if no one had appeared, the Court would probably not have made the rule absolute for an attachment, except on an affidavit of personal service." But I am very clearly of opinion that the party here served was an agent, within the meaning of the Act. If it were otherwise, the Act would, in a vast variety of cases, be wholly nugatory. The meaning of the Legislature, apparent from the words of the statute, was, that there should be, between the party served and the individual sought to be served, that relation which would impose upon the person who received the writ an obligation to communicate it, and would give him the means of communicating it. The words of the

(a) 3 Dowl. 447.

section are—"Any agent or representative, or any manager of
 "the real or personal estate of such defendant, within such juris-
 "diction." In *Wright v. Miller* (a), the plaintiff's affidavit stated
 that Gordon was a law agent, and in constant communication with
 the defendant; and a letter from the defendant to Gordon was read,
 in which she instructed Gordon to transact business for her, with
 reference to her interest in an estate in this country. Gordon made
 an affidavit, in which he swore that he was an English barrister;
 that he did not intend to remain in Ireland; that he had transacted
 business for the defendant as a friend; but that, for the last three
 months, he had no communication with her; and that he did not
 know where to direct a letter to her. The Court held, "If a man is
 "an agent, and does not know where his principal resides, but it is
 "evident that he has the means of discovering his residence, they
 "will direct service to be substituted on him." What was the charac-
 ter of this gentleman's agency? Little is referred to in the document
 issued, as I must now hold, with the privity of the defendants, as
 their agent in Belfast. That document points out the circumstances
 of attraction that exist in the business of the defendants; and it
 specially guards the public against purchasing concentrated coffee
 except from the defendants' established agents. Nothing could be
 more important for the defendants, than that the public should be
 aware that there was an agent from whom they could procure goods
 of a genuine character. Little alone is the agent so constituted.

Was this a kind of agency sufficiently large to satisfy the Court
 that the agent stood in such a relation towards his principals that
 he would have violated a moral duty if he had not communicated
 the service to them, and that he had the means of so communicating
 it? I think this appears upon the face of the proceedings. The
 words of the Act are "any agent," and it cannot be contended that
 that means the agent of all the real and personal estate.

FITZGERALD, B.

I entertain very great doubts whether this case is within the
 class of cases contemplated by the Act; but the authorities cited go

(a) 1 Ir. Jur., N. S., 295.

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M. T. 1860. as far and farther ; and I do not feel myself at liberty to differ from
Exchequer. them. I do not, however, think it has been decided, and I do not
REILLY concur in the opinion, that the test of agency, within the meaning
v. of the Act of Parliament, is, whether there is a reasonable proba-
WHITE. bility of the writ reaching the defendant.

HUGHES, B.

I am of opinion that this case is clearly within the authorities referred to. But if it were not within the authorities referred to, I should have no hesitation in deciding that the case is within the Act of Parliament.

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*Exchequer Chamber.**

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v.

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LONDONDERRY & COLERAINE RAILWAY CO., in Error,

v.

SAME.

(*Error from the Common Pleas.*)

June 7, 8,
 9, 18.

THIS was an action by the plaintiff (defendant in Error) against D. K. sued the B. and B. the Belfast and Ballymena Railway Company, the Coleraine and Railway Company, the L. Londonderry Railway Company (plaintiffs in Error), and W. and C. Rail- way Company

and W. M'C., jointly, as common carriers, for the loss of a certain travelling-case containing watches, whilst being carried by them from B. to L., he being a second class passenger travelling from B. to L. upon a through ticket. The defendants, amongst sundry other defences, pleaded that D. K. was only entitled to carry personal luggage, and that the case in question did not answer that description, but that it and its contents constituted merchandize. The plaintiff replied that the case was in appearance fit for, and manifestly did contain, merchandize, to wit, watches, and not personal luggage, and that defendants received it without objection, and without demanding extra remuneration, and without making inquiry of the plaintiff touching the value of the contents of the case, and that there was no improper concealment on his part. The defendants rejoined, traversing the averments in the replication, and the jury found that the said case was in appearance and fact fit and proper for, and manifestly did contain, merchandize, but that the particular sort of merchandize which it so contained did not manifestly appear, but that in point of fact it did then contain watches. They also found that there was no improper concealment on the part of the plaintiff, touching said case. They also found that the defendants were not guilty of gross negligence. Upon a motion to enter up judgment for the defendants, *non obstante veredicto*, on the ground that the replication was no valid answer to the foregoing special defence, the Court below having given judgment in favour of the plaintiff, the defendants suggested error.

Held (by three Judges against three), affirming the judgment of the Court of Common Pleas, that the above replication disclosed a valid answer to said defence.

Held also (by three Judges against three), that the finding of the jury thereon was substantially a finding in favour of the plaintiff.

Held also, that the judgment against the said defendants (plaintiffs in Error) ought not to be arrested in consequence of the acquittal of a co-defendant, notwithstanding that the duty, the breach which was complained of, grew out of an implied contract.

* *Coram* LEFROY, C. J.; FIGOT, C. B.; PERRIN and O'BRIEN, J.J.; RICHARDS and FITZGERALD, B.B.—PERRIN, J., was not present at the delivery of the judgment of the Court.

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M'Cormick, who had been sued as joint defendants, for the loss of a case of watches, the property of the plaintiff, whilst the latter was travelling with same as a Railway passenger from Belfast to Londonderry. [For the pleadings, see vol. 8, pp. 167, 173]. The Court of Common Pleas, upon a motion for a new trial, and in arrest of judgment, and for judgment *non obstante veredicto*, having ruled in favour of the plaintiff, the defendants (plaintiffs in Error) filed suggestion of error upon the judgments accordingly entered up.

The following grounds of error were assigned by the Belfast and Ballymena Railway Company:—

First; that the verdict had for W. M'Cormick, one of the defendants in this case, was tantamount to a verdict in favour of all the defendants, and that judgment should have been entered not for the said defendant W. M'Cormick alone, but for all the defendants.

Secondly; that the verdict and finding of the jury, upon the fifth issue submitted to them, was, in effect, a finding in favour of all the defendants, and that judgment should therefore have been entered for all the defendants.

Thirdly; that the jury having found that the said defendants were not guilty of negligence, as alleged, judgment should have been entered up for all these defendants.

Fourthly; that the judgment against these defendants should have been and should be arrested, inasmuch as the replication by the said plaintiffs, replied to the twelfth defence of these defendants, discloses no answer good in substance to such defence.

The Londonderry and Coleraine Railway Company assigned similar grounds of error, with the following one in addition; namely, that the findings of the jury on the ninth and tenth issues being uncertain, and insufficient to entitle the plaintiff to have a verdict entered for him on these findings, or either of them, judgment should have been entered for the defendants.

The following is an exact copy of the findings of the jury upon the several issues.

First; that the said case and watches were not lost, that is, ^{as}

in the thirteenth and fourteenth defences of the defendants the Belfast and Ballymena Railway Company, the second defence of the defendants the Londonderry and Coleraine Railway, and the eighth defence of the defendant W. M'Cormick mentioned.

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Secondly; that the case and watches were not accidentally lost.

Thirdly; that the said case and watches were not accidentally lost.

Fourthly; that the said case and package and watches were feloniously stolen, taken and carried away, by a servant then in the employment of the defendants the Belfast and Ballymena Railway Company and the Londonderry and Coleraine Railway Company, but not in the employment of the defendant W. M'Cormick, whilst the said case and watches were in the custody and possession of these said defendants the Belfast and Ballymena Railway Company and the Londonderry and Coleraine Railway Company, as common carriers.

Fifthly; that the said case was, in appearance and fact, fit and proper for, and manifestly did contain, merchandize, but that the particular sort of merchandize which it so contained did not manifestly appear; but the said jury now find that the said case did then contain watches.

Sixthly; that there was no improper concealment on the part of the plaintiff, touching the said case, as in the last rejoinder of the defendants W. M'Cormick and the Londonderry and Coleraine Railway Company alleged.

Seventhly; that none of the defendants detained from the plaintiff the said case and watches.

Eighthly; that none of the defendants converted the said case and watches to their own use.

Ninthly; that the defendants the Belfast and Ballymena Railway Company and the Londonderry and Coleraine Railway Company were common carriers upon the said Railways, as in the plaint alleged, but that the defendant W. M'Cormick was not.

Tenthly; that the plaintiff became a passenger on said Railway, and paid money for his said ticket to the defendants the said Belfast and Ballymena Railway Company and the Londonderry and Coleraine Railway Company, and was conveyed by these said

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defendants, but that he did not become a passenger of, pay his money to, nor was he conveyed by, the defendant W. M'Cormick. Eleventhly; that the plaintiff was requested to deliver, and that he did deliver to the said Thomas Conolly, the said case and watches as in the plaint alleged.

Twelfthly; that the defendants the Belfast and Ballymena Railway Company and the Londonderry and Coleraine Railway Company did contract with the plaintiff, as in plaint alleged, but that the defendant W. M'Cormick did not so contract.

Thirteenthly; that none of the defendants were guilty of gross negligence, as in plaint alleged: and the plaintiff having entered a *nolle prosequi* as to the third and fifth paragraphs of his summons and plaint, the said jury say that the said plaintiff has sustained damage, by reason of the grievances in the first paragraph of the summons and plaint mentioned, to the sum of £1261, and the said jury assess the plaintiff's costs by him about his suit in that behalf expended, as against the said defendants the Belfast and Ballymena Railway Company and the Londonderry and Coleraine Railway Company, to six pence, and the said jury assess the defendant W. M'Cormick's costs to six pence therefor, and soforth.

Lynch and May, on behalf of the plaintiffs in Error the Belfast and Ballymena Railway Company.

Joy and James Hamilton, on behalf of the plaintiffs in Error the Londonderry and Coleraine Railway Company.

Fitzgibbon and Heron, for the defendant in Error.

The following cases and authorities were cited during the progress of the arguments; *Great Northern Railway Company v. Sheppard* (a); 1 W. 4, c. 68; *Gibbon v. Paynton* (b); *Powell v. Layton* (c); *Max v. Roberts* (d); *Pozzi v. Shipton* (e); *Richards v. London, Brighton and South Coast Railway Company* (f);

(a) 8 Ex. 39.

(b) 4 Burr. 2298.

(c) 2 N. R. 365.

(d) 2 N. R. 450; S. C. in Error, 12 East, 89.

(e) 8 Ad. & El. 976.

(f) 7 C. B. 839; 1 Wms. Saund. 291, e, f, g.

Doorman v. Jenkins (a); 9 *Co. Rep.* 1, q; *Pelly v. Horne* (b); *Spinner v. Walsh* (c); *Down v. Fremont* (d); *Beck v. Evans* (e); *Levi v. Waterhouse* (f); *Marsh v. Horne*; *Story on Bailments*, pp. 39, 476, 499 (g); *Rushton v. Aspinall* (h); *Wingate v. Christie* (i); 8 & 9 *Vic.*, c. 20; *Walker v. Jackson* (h); *Hearn v. London and South Coast Railway Company* (l); *Brook v. Richards* (m); *Stevenson v. Hart* (n); *Langley v. Brown* (o); *Great Northern Railway Company v. Rimmell* (p); *Butt v. Great Western Railway Company* (q); *Finucane v. Small* (r); *Read v. Gwillim* (s); *Boson v. Sandford* (t); *Govett v. Radnidge* (u); *Green v. Greenbank* (v); *Bretherton v. Ward* (w); *Coggs v. Bernard* (x); *Stuart v. Crawley* (y); 2 *Chitty on Pleading*, p. 660; *Crouch v. London and North Western Railway Company* (z); *Chitty & Temple on Carriers*, pp. 12, 34; *Forward v. Pittard* (aa).

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Cur. ad. vult.

FITZGERALD, B.

These cases come before the Court upon suggestions of error on a judgment of the Court of Common Pleas. That was a judgment for the defendant in Error, Keys, in an action brought by him as plaintiff against the present plaintiffs in Error and another, for the non-delivery of certain goods entrusted by him to them as common carriers for carriage. The judgment was entered on the first para-

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| (a) 2 <i>Ad. & El.</i> 256. | (b) 5 <i>Bing.</i> 220. |
| (c) 9 <i>Ir. Eq. Rep.</i> 339. | (d) 4 <i>Camp.</i> 40. |
| (e) 16 <i>East</i> , 244. | (f) 1 <i>Price</i> , 280. |
| (g) 5 <i>B. & C.</i> 322. | (h) 1 <i>Sm. L. C.</i> 334. |
| (i) 1 <i>Car. & K.</i> 61. | (k) 10 <i>M. & W.</i> 161-8. |
| (l) 10 <i>Ex.</i> 798. | (m) 4 <i>Bing.</i> 218. |
| (n) 4 <i>Bing.</i> 476. | |
| (o) 1 <i>M. & P.</i> 563, <i>S. C.</i> ; 2 <i>Bro. & Bing.</i> 177. | |
| (p) 18 <i>C. B.</i> 575. | (q) 11 <i>C. B.</i> 140. |
| (r) 1 <i>Esp.</i> 315. | (s) 12 <i>East</i> , 452. |
| (t) 1 <i>Shower</i> , 29, 101, 479. | (u) 3 <i>East</i> , 62. |
| (v) 2 <i>Marsh</i> , 485. | (w) 3 <i>Bro. & Bing.</i> 54. |
| (x) 2 <i>Ld. Raym.</i> 109. | (y) 2 <i>Starkie</i> , 323. |
| (z) 14 <i>C. B.</i> 255. | (aa) 1 <i>T. B.</i> 27. |

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The application of the defendants the Railway Companies to the Common Pleas was twofold—first, to arrest the judgment; or, secondly, to enter a judgment for the defendants. The Court of Common Pleas declined to comply with either, and gave judgment for the plaintiff in the action. We are now to consider whether they were right in both respects.

As regards the first, the only material defences to be considered are, in my mind, the twelfth defence of the Belfast and Ballymena Company, and the third defence of the Londonderry and Coleraine Company, which are substantially the same. The plaintiff (first paragraph) in substance states, that the three defendants, at the time when, &c., were common carriers from Belfast through Coleraine to Londonderry; that the plaintiff, at the defendants' request, in December 1856, was a passenger on their Railways, to be carried from Belfast through to Derry, for money paid by the plaintiff to the defendants; that one Connolly, a servant to the defendants, was guard of the train by which the plaintiff was travelling; that he, as such guard, between Coleraine and Derry, required the plaintiff to give to him a travelling-case, which the plaintiff was then carrying with him, that it might be carried in a certain part of the train appropriated to luggage and goods; that the plaintiff did, accordingly, deliver to Connolly the travelling-case, which contained a number of watches, of value to a considerable amount, and which, together with the watches therein contained, were to be safely carried to the end of said journey, and to be there re-delivered by the defendants, pursuant to their contract and duty as carriers; that it was the duty of the defendants safely to carry the travelling-case, and the watches therein contained, to the end of the journey, and there to deliver them to the plaintiff, so being such passenger as aforesaid; that the plaintiff paid his fare, and performed all things necessary to be performed, as such passenger, and that all conditions prece-

dent, necessary to be performed by the plaintiff, in order to enable him to have the case and watches safely carried to the end of the journey, and there delivered to him, were performed by him; that Conolly took the goods, and the defendants, by his hands, received them, for the purpose of being carried, for the remainder of the journey, to Derry; that on arrival at Derry the plaintiff demanded his goods of the defendants; that the defendants refused, and still refuse, to deliver them; that, by the gross neglect and default of the defendants, the goods have not been delivered to the plaintiff. This plaint seems to me to be expressly founded on the Common Law liability of the defendants, as common carriers, and distinctly to state that it was a part of their legal obligation, as such, to carry to the end of the journey, and there deliver to the plaintiff, being a passenger, the travelling-case and its contents, which case was, in the first instance, taken by the plaintiff with him, and afterwards, during the journey, was taken from him by the defendants' servant, to be carried, for the remainder of such journey, in a different part of the train. I see no case stated in it of gratuitous bailment of the case and its contents, any more than there would be, if, instead of being a case of watches, they had been stated to be, and, in fact, were, what has been called passenger's personal luggage. The gross neglect and default charged is, as it seems to me, the neglect and default of the defendants to discharge their Common Law obligation to deliver the goods, not as neglect or default in *the mode* of performing their duty, but a direct violation of that obligation in an essential part. The transaction with Conolly seems to me material only as excluding any possible presumption that the plaintiff himself undertook the care of the goods, or that his parting with them was a putting of them, by his own act, out of the charge of the defendants. By the Common Law liability of the defendants, as carriers, I understand the legal obligation which arises from the fact of their being such common carriers, and from the fact of goods being committed to them for carriage and delivery; and the extent of that Common Law liability is to carry them and safely deliver them, warranted against all injury save such as may arise from the act of God or the Queen's enemies. I think it extends to everything

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brought by the passenger with him, and accepted to be carried with him. [With that liability they seem to me to be sufficiently charged in the plaint, as regards the case and its contents. That being so, it lay on them to discharge themselves. There is no doubt that this Common Law liability may be restricted in the case of common carriers. It may be so by the statute 1 W. 4, c. 68 (the Carrier Act), where the provisions of that Act are complied with by the carriers. It may be so, by special contract between the parties, notwithstanding the provisions of that Act are not complied with. Though the Act, by its 3rd section, leaves the carrier not complying with its provisions, in express terms, to his Common Law liability, the 6th section provides, that nothing in the Act shall annul or affect any special contract, between the carrier and any other party, for the conveyance of goods, and the Act in terms applies to goods to be carried for hire, or to accompany the person of any passenger. Now by their twelfth defence the Belfast and Ballymena Railway Company in substance state, that they were at the time when, &c., common carriers for passengers, at certain fares, and common carriers for merchandize, at certain rates to be paid in that behalf; that the passengers on their Railway were entitled to carry with them respectively personal luggage free of any charge beyond their respective fares, but were not entitled to carry with them merchandize, without paying for the carriage of the same as merchandize, of which the plaintiff, before the delivery of the goods in question, had notice; that the plaintiff was a passenger on the Railway, and took with him the travelling-case and its contents, as his personal luggage, and without paying any fare or sum of money for the carriage thereof; that the case and its contents constituted merchandize, of which the plaintiff had notice, but of which the defendants had no notice or knowledge whatsoever; and that, save as aforesaid, the goods in question were not accepted by the defendants as common carriers or otherwise.

The third defence of the Londonderry and Coleraine Railway Company is substantially the same, except that it omits the qualified denial of acceptance. Both admit a delivery in fact of the goods in question; but the defence of the Belfast and Ballymena

Company denies acceptance with a qualification. I understand this denial to mean a denial that the goods were accepted as anything but personal luggage, the defendants being ignorant that they were something wholly different, while the plaintiff knew that they were so, and that he was not entitled to carry them with him *without paying specially for their carriage*. The defence does not say, paying beforehand, nor alleges that declaring the value and paying the fare was to be a condition precedent. It is obvious that these defences do not put forward the statutable qualification of the defendants' Common Law liability as carriers. No compliance on their part with the provisions of the statute is stated. It seems to me equally clear that they do not put forward any special contract between the parties, that the defendants' Common Law liability to warrant the safety and delivery of the goods should be restricted, by reason of their not being declared merchandize, and paid for as such beforehand. They do aver that the plaintiff knew, when taking them with him as personal luggage, and without specially paying for them, that he was exceeding the rights which he had acquired by payment of his fare as a passenger; but I can see nothing like an allegation that there was any special contract, that if he did not declare their nature and value, and pay for them beforehand, the Company should not be liable, to the extent of their Common Law liability, if it existed, in case of default or failure of delivery. If, therefore, these defences can be at all sustained, it seems to me that they only can be so by taking them as of the form pleaded by the Belfast and Ballymena Company, and as denying that there was any acceptance of the goods, such as to charge the Company at all, on the ground that the goods were merchandize, and not personal luggage; that the defendants were ignorant of this, while the plaintiff knew it, and knew also that his right, as passenger, was confined to the taking with him personal luggage only, and not merchandize, without paying extra fare, when demanded. Whether a defence of that kind can be sustained at all seems to me a very serious question. At present, however, I only say that the defences are not put on the statutable qualification

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of the defendants' Common Law liability, as alleged in the plaint, or on any special contract merely limiting or qualifying that Common Law liability to carry and deliver. The goods were in fact delivered to the defendants to be carried; but the defendants, it is said, accepted them only in the mistaken conception that they were personal luggage, while the plaintiff knew that they were not so, but merchandize, and that merchandize was liable to a special charge for carriage; and, therefore, it is relied on that the acceptance of the goods was wholly a nullity, to charge the defendants as common carriers or otherwise in respect of them.

To these defences the plaintiff replies, by the seventh replication, that the travelling-case was, in appearance and fact, fit and proper for the conveyance of, and manifestly did contain, such merchandize, to wit, watches, as in the plaint mentioned, and not personal luggage. That there was no concealment or fraud on the part of the plaintiff, touching the said travelling-case. That the defendants received the travelling-case as part of the personal luggage of the plaintiff, without making any objection, without demanding any extra remuneration from the plaintiff for the carriage thereof, and without any inquiry touching the nature and value of the contents.

The substance of this answer to the defences I take to be that, though it be true that the defendants had not notice or knowledge that the case and its contents were merchandize, they had, in the appearance of that article, the means of such knowledge, and that no concealment or fraud was practised by the plaintiff in that behalf; that, though it be true that the plaintiff knew he was exceeding his right, if he carried the articles with him without paying extra for them, no demand of such payment was made, nor was he asked to declare the nature or value of the contents of the case; that he practised no fraud; and a fraud it unquestionably would be to take them with him with the intent of not paying for them anything with which he was justly chargeable in that behalf. So far, I repeat I can find nothing to show that there was any special contract that the plaintiff should declare the nature or value of what he carried with him, or pay beforehand a distinct fare for what might not be properly personal luggage. I am aware that

it is the Common Law right of a carrier to be paid his fare contemporaneously with the acceptance of the goods, if he demand it; but, if he do not demand it, I have yet to learn that he can, without special contract, or fraud practised on him, escape from his liabilities as carrier, because the proper fare was not paid beforehand.

To this replication the Belfast and Ballymena Company rejoins, that the travelling-case was not, in appearance and fact, fit and proper for the conveyance of, and did not manifestly contain, such merchandize as in the replication alleged. The Londonderry and Coleraine Company rejoins, that it was not manifest that the travelling-case did contain such merchandize, to wit, watches, as in the replication alleged, and that there was fraud and concealment on the part of the plaintiff, touching it. The defendants thus select, as the issue to be joined, the external appearance and character of the article; to which the Londonderry and Coleraine Company add that of fraud and concealment by the plaintiff. Both admit the reception of the goods in question, as part of the plaintiff's personal luggage, which (if such) was, by their admitted obligation, to be carried to the journey's end, and there safely delivered to the plaintiff. Now the jury has found the truth of the plaintiff's side of the issue taken, to the extent that it was manifest that the case did contain merchandize, though it was not manifest that the merchandize contained was watches, but that in fact it did contain watches. This I take, and for the present shall assume, to be a substantial finding for the plaintiff; and the jury, further, negative fraud or concealment on the part of the plaintiff, touching the travelling-case. The application to arrest judgment is founded on the insufficiency of the replication as an answer to the defence, the substantial truth in fact of the replication being found by the jury, or admitted. Then the question is, whether the defendants, being Common Law carriers, to whom the case was in fact delivered as personal luggage (personal luggage of a passenger being a thing which they were admittedly bound safely to carry and deliver), and who received it as such personal luggage, can escape from the liability of re-delivering it; in other words, take it as a forfeit to themselves; for they allege no loss, no lien, because it was not in fact personal luggage,

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but merchandize; and because they did not know this, and the plaintiff did know it, and knew also that he was not entitled to have it carried without extra payment, though he intended no fraud, practised no concealment, and though the nature of the article was patent. The very statement of such a proposition seems to me almost sufficient to condemn it. The defendants are not here charged with a liability from their having lost the article; they themselves allege no loss of it—no lien upon it, but, admittedly, that they received the goods, say they are entitled to keep them, and that what they received as personal luggage is not to be dealt with in their hands as personal luggage, even to the extent of being re-delivered.

I know it may be said that, however it might be the duty of honest men to re-deliver under such circumstances, it is not their duty as common carriers, and it is only in that capacity they are charged here. It is in that narrow view of the case, and that only, that I think it at all material to consider the cases which have been made the subject of so much controversy in the argument. The defendants, being common carriers, did, in fact, receive these articles as things to be carried to Derry, and there safely delivered to the plaintiff, because they did receive them not only together with the plaintiff, but as part of his personal luggage, and their admitted obligation was to carry and deliver his personal luggage. The articles were not, in fact, personal luggage, and they were entitled to charge, for what they received, a fare beyond what had been paid them, but they did not know of this right, because they did not know that the articles were not personal luggage, but merchandize. The plaintiff did know of the defendants' right to be paid this extra sum, and he did not declare the nature or value of the articles, nor pay the extra sum. So far he left them in their ignorance; but he designed no fraud, he practised no concealment, and the nature of the articles was patent. Under these circumstances, I can conceive the defendants as having a lien on the articles for the payment of their proper rate; but that they are not liable to deal with them as what they took them to be, and re-deliver them, is what I cannot understand. Are they exempt from all obligation as common carriers in respect of the goods, and does the innocent (for so it is

found) act of delivering to them merchandize as personal luggage exempt them from what their obligation would be if the articles had been what they conceived them to be, and as which they received them? Assume, and it is the only assumption consistent with the pleadings, that the articles are now in the defendants' hands, would they not, because they are common carriers, have a lien on them for the extra carriage fare? and if they would, but do not choose to rely on it, can they say that, as common carriers, they are not bound to deliver? Nothing, as it appears to me, could annihilate their obligation, as common carriers, in respect of goods so received, except a fraud practised on them by concealment of the real value of the goods; that might, perhaps, I do not say it would, wholly nullify the acceptance of the goods as common carriers: and in truth, that such fraud only will do it, is the very point decided, but certainly not for the first time, in that much debated case of *The Great Northern Railway Company v. Sheppard* (a). In that case it was held, that so placing articles of merchandize as to conceal their real nature, and not declaring it, amounted to fraudulent concealment of the nature of the article, which avoided the contract founded on acceptance, at least to the extent of the carriers' liability for actual loss of the articles. The decision, if Parke, B., is to be believed, was not on the ground that the Company had no notice, but was on the ground that the plaintiff had so conducted himself that the Company was not aware of the nature of the articles.

In this case the nature of the articles was patent; fraud and concealment on the part of the plaintiff is negatived, and the avoidance of the contract is pressed to the extent not merely of the liability for the mode of performing it, but *in toto*, and to the extent of transferring property. But in that case, and it is an essential part of it, it lay on the learned Judge to show, in conformity with numerous authorities, that fraud, and fraud only, could have this effect of vitiating the contract, even to the extent there held; and how does he show it? At p. 38, after laying down that the carrier's obligation in that case was only to carry the passenger and his personal luggage, and that the articles there in question were not personal

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(a) 8 Ex. Rep. 30.

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Exch. Chanc. "these articles exposed, or had packed them in the shape of merchandise,
 BELFAST "dize, so that the Company might have known what they were, and
 AND "they had chosen to treat them as personal luggage, and carry them
 BALLYMENA "without any extra remuneration, they would have been responsible
 RAILWAY "for the loss." Again, at p. 39:—"If indeed they had known, as
 v. "might have suspected from the mode in which the parcels were
 KEYS. "packed, that they did not contain personal luggage, they ought to
 "have objected to carry them." Nor is this proposition laid down care-
 lessly, because it manifestly refers to a decision previously cited by
 himself at p. 37, in the case of *Walker v. Jackson* (a):—"No doubt,"
 says B. Parke, "it is the duty of the carrier, on receiving the parcel,
 "to ask such questions as may be necessary; and if he asks no ques-
 "tion, and there is no fraud, he is liable for the loss. It was so laid
 "down in the case of *Walker v. Jackson*."

Now, in the present case the nature of the goods was manifest: the Company might have known, not merely suspected, that they were merchandise; they demanded no extra remuneration; they allege no condition precedent of declaring value and paying extra fare. They received the goods as personal luggage of the passenger, and they asked none of the questions which the manifest appearance of the goods warranted. With Baron Parke's position perfectly agrees the case cited by Mr. Lynch in his reply, that of *Crouch v. London and North Western Railway Company* (b). In that case it was held that common carriers could not refuse to carry goods, on the ground that the person bringing them declined to answer questions as to their nature and value. So I say here, the defendants were bound, as common carriers, to carry the goods in question here, though value or nature was not disclosed. They might, to be sure, have had a special contract, making the disclosure of value and payment of extra fare a condition precedent, or they might have availed themselves of the Carriers Act, to ascertain the extent of the liability in case of actual loss or injury, if the value had not been disclosed, and, perhaps, if active fraudulent concealment had been practised, have availed themselves of it to defeat the contract further. In the

(a) 10 M. & W. 161.

(b) 14 C. B. 255.

case in 14 *C. B.*, the customer declined to answer the question, only because he was ignorant of the contents. But is there anything inconsistent with Baron Parke's position, that, if it be necessary, it is the duty of the carrier to ask the questions proper for ascertaining the nature and value of goods tendered to him (and is it not necessary), if he would avail himself of the defence of fraudulent concealment? far from it.

At p. 291, Jervis, C. J., says:—"If it be reasonable that the carrier should in any case be informed of the nature and contents of a package, the plea should have distinctly alleged that there was reasonable ground for requiring that information here." At p. 295, Maule, J., says:—"To make the plea a good one, it ought to have alleged some ground for making the inquiry; and as none is suggested, it must be considered that there was no special ground." But he adds, "To say that the Company may in all cases insist upon being informed of the nature and contents of every package offered to them, as a condition of their accepting it, seems to me a proposition that is perfectly untenable."

Now, can any one doubt that a reasonable ground for inquiry exists in a case like the present, when articles manifestly merchandise are taken by a passenger as part of his personal luggage, his right being only to take personal luggage, unless he pays an extra fare? For my part, I can see no injustice in holding the proposition that Companies not availing themselves of the provisions of the Carriers Act are bound to the full extent suggested in the cases from 8 *Exch. Rep.* and 10 *M. & W.*, and, as it seems to me, many other authorities. The Carriers Act, if its provisions be complied with, and as to all cases and articles within it, protects them from all liability in cases of loss or injury beyond the value of £10, unless the extra rate be paid beforehand; though it certainly does not, in any case, enable them to retain the articles carried, and escape all liability as carriers with respect to them. If they do not or cannot avail themselves of the provisions of that Act, and choose to rely either on special contract in the way of restriction, or a vitiation of contract, founded on fraud, to be spelled out of notice of their laws, in the party with whom they deal, a notice too often made out on evidence of

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the loosest kind, and an alleged want of knowledge in themselves. I see no injustice in holding them most strictly to the narrowest limits of such defences, and, in every way short of sanctioning plain fraud, defeating them. I am, therefore, of opinion that the judgment in this case ought not to have been arrested, and that the Court of Common Pleas was right in refusing so to do.

I shall only add that, though undoubtedly the rest of the record shows that, in fact, the defendants have not the goods, it is also shown that they have them not, not because they were accidentally or carelessly lost, but were stolen by one of the servants. Now as restrictive only of their liability, that mode of loss would not be available, and therefore it is not stated, because what they elected to rely on is not a restriction of contract, but the untrue defence of a vitiation *in toto*, on the ground of fraud. The grounds on which it is insisted that there ought to be judgment for the defendants are, first, it is said, that the third defence of the Belfast and Ballymena Railway Company is a bar to the whole action, and that the issue thereon has been found for those defendants. This defence alleges that the defendants are not guilty of such neglect or default, as is in the plaint alleged, in manner and form as therein alleged. I do not find any corresponding defence by the Londonderry and Coleraine Railway Company. Now the foot on which this is contended, as I understand it, is this, that the only liability charged against the defendants in the plaint, as respects the goods in question, is that of gratuitous bailment, and that in such case the defendants would be only chargeable in case of gross negligence. I have already stated the plaint, and have only to repeat that it seems to me that it is plainly founded, as to the goods in question, as well as everything else, on the Common Law liability of the defendants, and that the gist of the action is their direct tortious violation of that Common Law liability in not delivering the goods. There is no finding that they have delivered them, nor even an allegation that they have done so. *Secondly*; it is said that the finding on the fifth issue is in effect a finding for the defendants. The fifth issue is, whether the said case was in appearance and fact fit and proper for, and manifestly did contain, merchandize, as in the replication alleged? I have already stated

the finding on this issue. The reason for which it is said to be a finding for the defendant is, that though the jury have found that it did manifestly contain merchandize, and did in fact contain watches, yet that it did not manifestly contain watches; and it is said that the allegation in the replication is that it did manifestly contain that particular kind of merchandize. I really will not dwell on this objection, it seems to me beyond argument; it is, to my mind, plain that the substance of the issue was, as to merchandize, and not the particular kind of merchandize mentioned in the replication. Thirdly, and lastly; it is said, that the action is founded on contract, and that being so, a verdict for one of the defendants, M'Cormick, is necessarily a verdict for all his alleged co-contractors. In my opinion, an action against carriers, on their Common Law liability, which this is, is not an action founded on contract, but on *tort*; and though, previously to the Common Law Procedure Act, an action, in the form of *assumpsit*, might be here maintained, on a compact implied from the legal obligation, that did not alter the foundation of the action; and there being no forms of action now, the only question is as to the substance and foundation. The Common Law liability of carriers arises from the fact of their being carriers for hire, and the fact of goods being deposited with them to be carried and delivered. Of that obligation the violation is a tort, though the law may imply a contract from it, which would, before the Common Law Procedure Act, have sustained an action in the form of *assumpsit*.

I shall just mention what seems to me the general rule, as laid down by Mr. Justice Littledale, in the case of *Burnett v. Lynch* (a):—
 “When, from a given state of facts, the law raises a legal obligation
 “to do a particular act, and there is a breach of that obligation,
 “and a consequential damage, there, although *assumpsit* may be
 “maintained upon a promise implied by law to do the act, still an
 “action on the case, *founded in tort*, is the more proper form of
 “action, in which the plaintiff in his declaration states the facts out
 “of which the legal obligation arises, the obligation itself, the breach
 “of it, and the damage resulting from the breach; for that is the

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(a) 5 B. & C. 589.

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Exch. Cham. "form of action in which the *real cause of action* is most accurately
 BELFAST described is the best adapted to any case."
 AND
 BALLYMENA We have now nothing to do with the form, but with the *real*
 RAILWAY cause of action only. I am, therefore, of opinion that the application
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O'BRIEN, J.

I am of opinion that the judgment of the Court of Common Pleas should be reversed. I shall confine my observations to the case of the Belfast and Ballymena Company, as it has been stated in the argument that the questions with respect to them are substantially the same as those with respect to the Londonderry and Coleraine Railway Company (also defendants below). The summons and plaint contains *five* paragraphs, but the *first* is the only one now relied on by Keys (the plaintiff below), and on which he has obtained his verdict. The jury found against him on the second and fourth paragraphs (for *detinue* and *trover*), and he has filed a *nolle prosequi* as to the third and fifth paragraphs.

The defences of the Belfast and Ballymena Railway Company to the first paragraph are their first, second and third defences (traversing some allegations in that paragraph); and also their twelfth, thirteenth and fourteenth defences, which are special, and were filed as well to the first as to the third and fifth paragraphs. The plaintiff filed a demurrer and also replications to those thirteenth and fourteenth defences, and the defendants do not now rely on them. They rely upon the third and twelfth defences, and upon the pleadings and findings as to them. The plaintiff's seventh replication was filed to the twelfth defence, and defendants' second rejoinder was filed to that replication. And in considering the questions now raised before us, it is necessary to keep distinct the pleadings and findings as to the defences upon which those questions arise, from the pleadings and findings as to the other defences.

In the first paragraph the original contract is stated as one made by defendants, being common carriers, to carry plaintiff as a pas-

senger by their Railways from Belfast to Coleraine, and then to Londonderry. That contract, though not expressly referring to luggage, yet of itself imposed upon defendants the liability to carry plaintiff's *personal* luggage, but would not of itself have been sufficient to render them liable in respect of a box such as the travelling-case in question, which contained merchandize. This appears clear, upon the authorities to which we have been referred, and particularly the case of *The Great Northern Railway Company v. Sheppard (a)*, and has not been controverted in the argument. But the plaintiff, in his first paragraph, states various facts which occurred subsequently to that original contract (viz., that Conolly, defendants' servant, required plaintiff to deliver to him the travelling-case; and that accordingly same was delivered by the plaintiff and received by the defendants, through their servant, in order to be carried to Londonderry, and then re-delivered to the plaintiff; and that, by reason of the defendants' gross neglect, it has not since been re-delivered). And the plaintiff relies on those subsequent facts as attaching a liability to the defendants, in respect of the travelling-case, though the original contract may not have done so.

The charge of gross neglect contained in that paragraph, and which, if true, would have furnished a further ground for attaching liability to the defendants, has been traversed by their third defence, and the jury have found thereon (thirteenth issue) in the defendants' favour, viz.:—"That they were not guilty of gross negligence, as alleged." The defendants also rely, in answer to this paragraph, on the special facts stated in their twelfth defence, viz.:—"That they "were common carriers on said Railway, not merely of passengers, "for fares, but also of merchandize, for certain rates; that passengers were entitled to carry their personal luggage, free of charge, "but not entitled to carry with them any merchandize, without "paying for the carriage of same, of which the plaintiff, before the "delivery of same, had notice; that plaintiff, on this occasion, was "a passenger, and took the case with him as his personal luggage, "and without paying any fare for its carriage; that the case and its "contents constituted merchandize, of which plaintiff had notice,

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"but of which defendants had no notice or knowledge whatsoever;
"and that, save as stated in that defence, the travelling case and
"its contents were not received by defendants as common carriers."
I think it follows, from the authorities to which we have been
referred, particularly the case of *The Great Northern Railway
Company (a)*, that this state of facts, if not qualified or otherwise
explained, would (particularly with the finding that the defendants
were not guilty of gross negligence) constitute a valid defence to the
first paragraph, even without imputing any improper concealment
or fraud to the plaintiff, which, in fact, is not alleged by these
defendants in their pleadings. The Company were entitled to fares
for the carriage of merchandize. The plaintiff knew of their right
to make that charge; he knew that the box contained merchandize,
and was liable to such charge; he did not disclose that fact to de-
fendants' servants, either at the time of the original contract, or
when Conolly took the box from him. The agreement of the de-
fendants was (as stated by Baron Parke, with reference to the case
of *The Great Northern Railway Company*) to carry for the stipu-
lated fare plaintiff and his personal luggage; and they were not
bound to carry merchandize or articles wholly unconnected with
personal luggage. If they had known that the box contained mer-
chandize, they would probably have charged for it; and, without
imputing any improper concealment or fraud to the plaintiff, it may
also be said, in this case, "That the plaintiff had so conducted
"himself, that the Company were not aware he was not carrying
"luggage, and, therefore, the loss must be borne by him."

Plaintiff, without actually controverting the facts stated in this
twelfth defence, contends, however, that, according to some observa-
tions of Baron Parke in his judgment, the facts appearing in the
seventh replication, and the findings of the jury on the issues in
respect thereof, are a sufficient answer to this twelfth defence. In
his seventh replication he states, that the travelling-case was, in
appearance and fact, fit and proper for the conveyance of, and mani-
festly did contain, such merchandize, to wit, watches, and not per-
sonal luggage, as in the summons and plaint mentioned; and that

(a) 8 Exch. Rep. 39.

there was not any improper *concealment or fraud* on the plaintiff's part, touching said travelling-case (as to which I have already observed). He also states that the defendants received said travelling case and watches as part of plaintiff's personal luggage, without making any objection thereto, or demanding any extra remuneration for the carriage thereof, or making any inquiry touching the nature or value of the contents of said case. To this replication defendants filed a rejoinder, traversing the statement as to the appearance of the travelling-case, and as to its manifestly containing merchandize, and the jury found thereon (fifth issue), "that said case was in appearance and fact fit for, and did manifestly contain, "merchandize." (I shall refer upon another point to the subsequent qualifying statement in this finding.) Now does it follow, from the decision in the case of *The Great Northern Railway Company v. Sheppard*, or from the judgment of Baron Parke, that the further facts appearing on this seventh replication, and the findings thereon, are sufficient to establish the defendants' liability, notwithstanding the facts appearing on their twelfth defence. The decision in that case was in favour of the Company, even though there was no statement in the report of the case before the Court (as there is here in the twelfth defence), that the passenger knew that the Company were entitled to charge rates for the carriage of merchandize. The observations of Baron Parke, relied on by the plaintiff (even supposing them to bear the construction contended for), were with reference to a supposed state of facts not before the Court, and to what his opinion would be as to the liability of the Company, in case that state of facts existed. But do they, when considered with reference to other portions of his judgment, bear such a construction as would establish defendants' liability, upon the facts appearing in this case? It is true that, in page 34, he states—"If the articles had been carried openly, so that it might have appeared that they were merchandize, the Company, if they undertook to carry them, would be liable for their loss." He adds, however, "but why should they be so when they did not *know* what the parcels contained, and therefore had no opportunity of bargaining for any extra charge?" Again, in page 37, he states—"No doubt, it is the duty of the car-

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"rier, on receiving the parcel, to ask such questions as may be necessary; and if he asks no questions, and there be no fraud, he is liable for its loss."

The case of *Walker v. Jackson* (a) referred to by Baron Parke, and also during the present argument, does not decide the question now before us; because the original contract with the plaintiff in that case was expressly about a carriage for which a certain fare was to be paid, and which for that purpose was actually delivered to the defendants. But Baron Parke goes on to say that in the case of *The Great Northern Railway Company*, the contract "was to carry passengers and their luggage; then, if the Company had notice that a passenger brought with him goods which were not luggage, and chose to carry them, they would be responsible; but if no notice was given, there was an unfair concealment, which prevented them from making a charge as for merchandize." Again, in pp. 38, 39, he expresses his opinion that the Company would have been liable if plaintiff had carried the articles openly, or had packed them in the shape of merchandize, "so that the Company might have known what they were, and, if they had chosen, to treat them as personal luggage, and to carry them without demanding extra remuneration;" and also, if the Company had notice, or might have suspected, from the mode in which the parcels were packed, that they did not contain personal luggage. He adds, however, that the Great Northern Railway Company "had no notice of what the packages contained." It appears to me, that these several observations of Baron Parke (particularly when considered with reference to other parts of his judgment, and to the facts before him) would imply that even if, in the supposed case to which he referred, the parcel was (as found by the jury here) "in appearance and fact fit and proper for, and did manifestly contain, merchandize," yet that, to establish the Company's liability, there should also be evidence to show that their servants had at least seen the parcel, at or before the time the passenger had purchased his ticket, or commenced his journey with the parcel in the Railway carriage; or that, at all

(a) 10 M. & W. 161.

events, the parcel had been carried in their view or openly, so that they might, in ordinary course, have seen it. But does it follow that the Company should be liable in this case, where no such evidence is given, and where it does not even appear that the Company's servants were aware, before the commencement of the journey, that the plaintiff had with him any luggage or parcels whatever, whether personal luggage or otherwise? The opinion expressed by Baron Parke (p. 34), of the Company's liability, is evidently on the supposition, not merely that the appearance of the parcel was that of containing merchandize, but also that it was carried openly, so that it might have appeared to the Company or their servants to contain merchandize. It appears to me that his subsequent observations, relied on by the plaintiff's Counsel, are subject to the same qualification, and that he did not intend to lay down such a rule as would make the Company liable in this case, by reason of the appearance which the box presented, without any such further evidence, as I have above mentioned. In this case it does not appear that any of the defendants' servants saw the plaintiff's travelling-case until the time when Conolly took it from plaintiff, in the Railway carriage between Coleraine and Londonderry; and I think that what then occurred, or the manifest appearance which the travelling-case presented at that time, cannot be relied on by the plaintiff as supporting his claim upon the original contract, previously entered into by the Company with the plaintiff, when he took his ticket, and which was a contract to carry him and his personal luggage. In the case of *The Great Northern Railway Company* (p. 39), it appears that the argument of a new contract after the commencement of the journey was also urged against the Company, but without effect.

The doctrine contended for by the plaintiff is one that in its results may be productive of great injustice. A passenger, though without any improper or fraudulent motive, may carry a valuable parcel of merchandize in such a manner as that the parcel should not even be seen by any of the Railway Company's servants, either at the time he purchases his ticket (and thereby

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enters into a contract the effect of which is that the Company are to carry himself and his personal luggage), or at any time until after he commences his journey in the Railway carriage. He knows that, by the rules of the Company, they are entitled to fares for the conveyance of merchandize, and that his parcel contains merchandize. He does not disclose that fact to the Company's servants, or show them the parcel, or carry it in such a manner as that they might see it. I think it would be unjust to the Company, under these circumstances, and even without imputing any fraud or improper concealment to the passenger, to hold that they should be liable for the safe carriage of the merchandize, because, in a subsequent part of the journey, their guard removed the parcel from where the passenger had it, to another part of the carriage, and because "it was in appearance and fact fit for, and did contain, merchandize." Should we not rather, under such circumstances, hold, to use nearly the same language as that of Baron Parke (a), that the passenger, though without any fraudulent intent, had so conducted himself that the Company were not aware that he was carrying merchandize, and that therefore he should bear the loss? By adopting this rule, I do not think that injustice would be done to the passenger, as he knows that the Company are entitled to charge for merchandize, and if he wishes to obtain the guarantee of the Company's liability for the safe carriage of his parcel, he can effectually do so by either paying that charge, or even by apprising the Company's servants that the parcel contains merchandize.

The plaintiff's Counsel have also relied in the argument on the finding of the jury, as to the fourth issue, that the travelling-case was feloniously stolen by one of the defendants servants, while in their custody and possession. But that issue was not upon any statement contained in the summons and plaint, or in the twelfth defence, or the seventh replication filed thereto, or the rejoinder to that replication. It was on a statement, to that effect, contained in the sixth replication, which, as I have already observed, was filed to the thirteenth and fourteenth defences (which are not now relied on);

(a) 8 Exch. 39.

and the finding on that fourth issue cannot, therefore, in my opinion, be relied upon in support of the plaintiff's case, as to questions arising upon the twelfth defence, and the subsequent pleadings thereon. A further objection to the plaintiff's right to recover on the pleadings has been urged, on the ground that the latter part of the finding of the jury on the fifth issue (as to the appearance of the travelling-case) states that the particular sort of merchandize which the case contained did not manifestly appear, though the jury also found that it did, at the time in question, contain watches. Now so far as the appearance of the travelling-case affected the plaintiff's right to recover, it may have been sufficient for him to have stated that, in appearance and fact, it was fit for, and manifestly contained, merchandize, without specifying watches; but as, by the first paragraph of his summons and plaint, he stated that the box contained watches, and, as by his seventh replication he stated the appearance of the box, with reference to watches particularly, and, as the fifth issue was taken on that statement, and on the defendants' fourth rejoinder thereto, I think that the finding is not in accordance with that statement.

Another ground has been relied on by defendants, namely, the verdict for M'Cormick, one of the co-defendants; but, for the reasons already suggested by several Members of the Court during the argument, I do not think that this objection is sustainable.

In my opinion, however, the judgment of the Common Pleas should be reversed, upon the grounds which I have stated.

GREENE, B.

The question for our decision in this case is, whether judgment should be arrested, or entered for the defendant, notwithstanding the findings of the jury? The motion has been rested upon two main grounds; first, that the action being founded upon contract, or *quasi ex contractu*, and one of the three defendants having obtained a verdict, there can be no judgment against the other two; and next, that upon the pleadings there appears a sufficient bar to the plaintiff's action.

The case has been argued upon the first paragraph of the plaint;

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and the subsequent pleadings referable to it. To these alone, therefore, it will be necessary to advert. That paragraph in substance alleges that the defendants are common carriers; that the plaintiff at their request, became a second-class passenger, to be carried from Belfast to Londonderry, for a certain reward, to wit, ten shillings; that Thomas Conolly, a servant of defendants, being the guard of the train, required of the plaintiff to deliver to him a travelling-case, which the plaintiff was carrying with him, in order that it might be carried in a certain compartment of a carriage appropriated to the conveyance of luggage and goods; in pursuance of which requisition the plaintiff accordingly delivered to Conolly the case, containing a large number of watches, which were *to be safely carried* to Londonderry, and there re-delivered by the defendants to plaintiff, pursuant to their contract and duty as carriers; that it was the duty of the defendants safely to carry the case to Londonderry, and there to re-deliver it to the plaintiff; that he the plaintiff duly paid his fare, and performed all necessary conditions precedent. That Conolly, the guard, took said goods into his charge, and that the defendants, through his hands, received the said goods, for the purpose of being carried. That, on the arrival of the train at Londonderry, the plaintiff demanded the case and watches of the defendants, through Conolly and their other servants, and required of the defendants, through such their servants, to re-deliver the same to him, according to their duty and contract; but that the defendants therein made default, and that, by reason of the gross neglect and default of the defendants, the case and watches have never been delivered.

The twelfth defence is that which more especially relates to the present question. It begins by stating that the defendants are common carriers of passengers, and also common carriers of merchandize; that passengers are entitled (that is, as I understand, with reference to the position of the parties, as passengers, on the one hand, and common carriers on the other, irrespectively of agreement) to carry their personal luggage (not defining what that is), free of charge, but not entitled to carry merchandize without paying for it. I construe "entitled" as referring to the extent of the

plaintiff's rights, as the employer of the defendants as common carriers. It then avers that the plaintiff had notice of this extent of his legal rights; that he was a passenger, and took with him the case in question, as his personal luggage, and without paying for it; that the case in fact contained merchandize (not stating what), of which the plaintiff had notice, but of which defendants had no notice or knowledge whatsoever, and that, save as in this defence mentioned, the defendants did not receive the travelling-case or its contents. Here the receipt in fact is not negatived; but the defence relied on is that, inasmuch as the plaintiff took the case with him as part of his personal luggage, when, in point of fact, it contained merchandize, and inasmuch as they the defendants were ignorant of that fact, they are not responsible.

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To this defence the replication is, that the travelling-case was, in appearance and fact, fit and proper for the conveyance of, and manifestly did contain, such merchandize, to wit, watches, and not personal luggage, as in the plaint mentioned; that there was no fraud or improper concealment on the part of the plaintiff; that, under these circumstances, the defendants received the case as part of plaintiff's personal luggage, without objection—without making any demand of extra fare, and without making any inquiry. To this there is a rejoinder, denying that it was manifest that the case contained such merchandize, to wit, watches, as alleged in the replication, and affirming that there was improper concealment on the part of the plaintiff.

Upon these pleadings, two issues (the fifth and sixth) were framed, namely, whether the travelling-case was in appearance fit and proper for, and manifestly did contain, merchandize, as in the replication alleged, and whether there was improper concealment on the part of the plaintiff?

In answer to the fifth issue, the jury say that the travelling-case was in appearance fit and proper for, and manifestly did contain, merchandize; but that the particular description of merchandize did not manifestly appear, although in fact the case contained watches: and, in reply to the sixth issue, they say that there was no improper concealment on the part of the plaintiff.

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I am of opinion, upon the facts declared in these pleadings, first, that the action is substantially in tort, and not in contract; and consequently, that the acquittal of one of the defendants does not invalidate a verdict against the other; and, secondly, that there is no bar, upon the whole record, disentitling the plaintiff to the benefit of the verdict which he has obtained. It is true that the first paragraph speaks of the duty and contract of the defendants; but the words "as carriers" are added, clearly showing that what is termed *contract* is incident to and consequential from their character of common carriers, and not the result of specific agreement. "Duty" and "contract" are coupled together, as in effect the same. The count does not allege any undertaking or promise, but simply that the watches were to be safely carried; that is, that the delivery of the parcel to the defendants' servant involved the obligation of safe carriage. It avers that it was the defendants' duty to carry and re-deliver, and a breach of that duty in not so doing: and the defendants, in their twelfth defence, appear to me so to treat the charge against them; for they allege themselves that they are common carriers, and seek to shelter themselves not under any excuse founded upon the existence of contract, but upon exemption from liability, upon grounds applicable, properly and distinctly, to an alleged restricted obligation arising, under the peculiar circumstances, from their position as common carriers. I see no ground whatever, therefore, for saying that this is an action on contract, so as to involve the consequence that there must be a verdict against all, or judgment against none.

I come now to the main question which was chiefly argued, namely, whether, viewing this as an action of tort, anything appears upon the record calling upon us to arrest the judgment, or enter a judgment for the defendants. Their Counsel have very ably contended that there is enough for this purpose apparent upon the pleadings to which I have referred, and the issues and findings applicable to them, especially with reference to the twelfth defence, and the replication thereto. That replication was intended to bring the plaintiff's case within the principle and rule of law, alleged to have been recognised and enunciated by Parke, B., in the case of

The Great Northern Railway Company v. Sheppard (a). It is necessary to consider what that case decided, and then, whether the principle established by it applies to the case before us. The defendants' Counsel have gone so far as to contend that the case is an authority for them. It is true that the judgment was in favour of the Railway Company, upon the facts appearing on the case reserved. The plaintiff and his wife were third-class passengers, and brought with them, as personal luggage, a carpet-bag, deal box and two paper parcels, which in fact contained merchandize. *The porters of the Company did not interfere in any way.* The plaintiff and his wife themselves placed the parcels in their carriage; and, after they were deposited on the platform at Retford, they again took charge of the parcels, and placed them in the fresh carriage. The Court, upon these mere facts, thought that the case depended simply and solely upon the legal right of the plaintiff on the one hand, and the legal liability of the defendants on the other. The learned Baron says (p. 39):—"The defendants only agreed for the "stipulated fare to carry passengers, and everything which constituted personal luggage." But, although this abstract proposition was laid down, and, being unaffected by any special circumstances, governed the case, yet he expressly says that, if the carrier ask no questions, and there be no fraud, he is liable; referring to *Walker v. Jackson (b)* as an authority to that effect. He says again:—"If "the Company had notice that a passenger brought with him goods "which are not luggage, and they chose to carry them, they would "be responsible; but, if no notice is given, it is an unfair concealment." This passage has been relied upon by the defendants' Counsel; and they say that, in the present case, they have alleged that they had no notice, and that this has not been traversed. But I think that, in using the word "notice," Baron Parke had reference to the case before him, where the Company, not having had any reason to suspect that there was merchandize, and being in fact ignorant that there was, were sought to be made liable, in a case where they never had an opportunity of knowing the alleged extent of their liability. It must, as I conceive, be so;

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(a) 8 Ex. 30.

(b) 10 M. & W. 168.

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for he adds:—"If the plaintiff had carried these articles exposed
 "or had packed them in the shape of merchandize, so that the Com-
 "pany might have known what they were, and they had chosen to
 "treat them as personal luggage, and carry them without demanding
 "any extra remuneration, they would have been responsible." And
 again:—"If indeed they had notice, or might have suspected, from
 "the mode in which the parcels were packed, that they did not
 "contain personal luggage, then they ought to have objected to
 "carry them;" evidently showing his opinion to have been that
 actual notice or knowledge is not necessary, if the circumstances are
 such as to make it proper to inquire. The doctrine here laid down
 is only a repetition of that enunciated by the same learned Judge,
 in *Walker v. Jackson* (a), where he expresses himself thus:—"I
 "take it to be now perfectly well understood, according to the
 "majority of opinions upon the subject, that if anything is delivered
 "to a person to be carried, it is the duty of the person receiving to
 "ask such questions about it as may be necessary. If he ask no
 "questions, and there be no fraud to give the case a false com-
 "plexion, on the delivery of the parcel, he is bound to carry it as it
 "is." Here the matter is treated as a generally understood and recog-
 nised rule; and nothing has occurred to disturb it. It was indeed
 argued here that it has been abrogated by the case of *Crown v.*
London and North-Western Railway (b), which, it was said, decides
 not only that the carrier is not bound to make inquiry, but that he
 has no right to do so. I apprehend, however, that that case is quite
 consistent with *Sheppard's case*, in 8 *Exch.* It decided, very pro-
 perly, that a carrier cannot refuse to carry, merely because he is
 refused information as to the contents of the parcel; but it does by
 no means follow that a carrier, when called upon to carry a parcel,
 is precluded from asking, not what it contains, but whether it con-
 tains merchandize, of any and what description, when the amount of
 his hire or reward is to be regulated by the answer to that inquiry.
 The proposition to be extracted, therefore, from the cases, appears to
 be this, that if, without fraud, misrepresentation or concealment, a
 traveller or passenger present himself, with a parcel or parcels, as

(a) 10 M. & W. 168.

(b) 14 C. B. 255.

portion of his personal luggage, the appearance of which parcel or parcels is manifestly such as to lead to the conclusion that they are not, in the strict and ordinary understanding of the terms, "personal luggage," and the carrier, with that appearance to guide or inform him, chooses to ask no questions, and receives them as on the footing of their being personal luggage, he is responsible for their safe delivery, in his character of carrier, as a consequence of his obligation to carry the owner and his personal luggage.

It was argued at the Bar that this doctrine was unreasonable, hard and unjust in this. But is this necessarily so? What, it may be asked, is "personal luggage?" It is not defined by law; it is a conventional phrase, and it is very much for the carrier himself to say what he will or will not accept and take charge of under that name. Suppose a parcel to be *over weight*, and the carrier, without insisting upon weighing it, to take it, no one could say that he would have a right to complain of being made answerable for its loss. The mere existence of a rule or regulation, though known to both parties, if not insisted upon, will not be a defence against liability, provided there be no fraud or concealment.

It appears to me that the replication to the twelfth defence brings the present case within the authority of the case in '8 *Ex.*, properly understood. The plaintiff thereby says, "I admit the rule—I admit that I took this as personal luggage, when, in fact, it contained merchandize; but I carried it openly, without fraud or concealment; the bare inspection of it must have shown that it was merchandize; and yet you received it from me as personal luggage, asked no questions, made no objection, and demanded no extra charge, and therefore you have not now any just right to say that you might have objected to it at the time. You are, therefore, liable under your Common Law obligation." It is now, in arrest of judgment, argued that the twelfth defence alleges that the Company had no notice or knowledge that the case contained merchandize, and that, as the replication leaves that unanswered, it must be considered that they had not, in fact, notice, and therefore the case fails. But the answer to that is, that if the facts disclosed in

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Next, it is urged that the plaintiff, having knowingly violated the rule of the Company, is precluded from recovering. The like answer applies to this argument, viz., that the violation was acquiesced in by the Company, or that the rule was dispensed with by them, with their eyes open. It is then insisted that the finding on the fifth issue is substantially a finding for the Company, and entitles them to judgment upon the whole record. But the finding is in substance for the plaintiff, for it is that the case contained merchandize. This is a motion in arrest of judgment; and we must look to the substance and pith of the issue, which was, not whether the appearance of the parcel indicated that it contained the species of merchandize, watches, but whether it contained merchandize. The whole contention between the parties was "merchandize or no merchandize," "merchandize or personal luggage," and not what was the description of the merchandize. It is next contended that the plaintiff having charged gross negligence, and the jury having negatived such negligence, the action is not supported. But, in the view which I take of the case, negligence is immaterial, the defendants being liable as common carriers, and not having been gratuitous bailees. Another objection was, that the Court should have averred that the Company undertook to carry the parcel for reasonable hire. I think the same answer may be given to this; and further, that if we come to the conclusion that the goods were received as personal luggage, the price of the ticket is the hire for the carriage of them, as well as of the plaintiff himself. It has been further objected, that no delivery to the Company is averred. But it is impossible to insist on this, where it is averred that the Company's servant demanded the parcel, and received it from the plaintiff. Again, it is said that the replication pleads only evidence. That would be true, if the case made by the replication were that the Company had notice or knowledge. But that is not the case. It is one of tacit acquiescence in receiving the parcel or personal luggage, altogether independently of any notice or knowledge on the subject. It was also strongly pressed that the plaintiff's conduct amounted to a representation

that what he had was merely personal luggage. It is sufficient, in reply, to say that no such defence is put forward on the pleadings, and that it is inconsistent with the finding of the jury, which negatives fraud or concealment on the part of the plaintiff.

I see no ground, from anything offered to us, for saying that judgment should be arrested, or entered for the defendants; and, consequently, I am of opinion that the decision of the Court below should be affirmed.

RICHARDS, B.

Attending to the plaint, or rather to the several paragraphs covered by the twelfth defence, and to the subject-matter of that defence, and to the replication thereto and rejoinder to that replication, I find the following facts and matters established on this record, some by the admission of the parties, and others by the findings of the jury, viz.:—That the defendants were common carriers on the Railway from Belfast to Coleraine and from Coleraine to Londonderry; that plaintiff, on the 1st of December 1856, became a passenger on such Railway from Belfast to Londonderry, on a through ticket, for which he paid 10s. That Thomas Conolly was a servant of the Company on that train, and that he required the plaintiff, in the course of the journey, at some place between Coleraine and Londonderry, to give to him a certain box or travelling-case belonging to the plaintiff, and that plaintiff did so, and that such box or case contained watches, to the amount in value, as found by the jury, of £1261, and that neither the travelling-case nor the watches were ever re-delivered to the plaintiff by the Company or by anyone. That the defendants were not only common carriers of passengers for hire, but were also carriers of merchandize, at certain rates to be paid in that behalf. That passengers travelling by the defendants' Railway were entitled to carry with them their personal luggage, free of any charge over and above any fare to be paid by such passengers; but were not entitled to carry with them any merchandize, without paying for the carriage of the same as such merchandize; of all which the plaintiff, before the delivery of his goods to Thomas Conolly, had notice. That the plaintiff, being a passenger on said

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Railway, on the occasion in the plaint mentioned, took with him the case in question, and the contents thereof, as his personal luggage, and without paying any fare for the carriage of the same, though the case and its contents constituted merchandize, as the plaintiff well knew, and not personal luggage, but of which fact the defendants had no knowledge whatsoever.

Now all the foregoing facts and matters are plainly and clearly admitted or established on this record, and the defendants conclude their twelfth defence by traversing the receipt of the case, otherwise than in that defence mentioned. The jury, however, upon one of the issues arising out of this line of pleading, find that there was no improper concealment on the part of the plaintiff, touching said travelling-case, on the occasion in question, and further, that said case was in appearance and fact fit and proper for, and manifestly did contain, merchandize; but that the particular sort of merchandize which it so contained did not manifestly appear, but they found as a matter of fact that the case did contain watches: and the jury further found, upon the thirteenth issue, that none of the defendants were guilty of gross negligence, as charged in the plaint.

It is not very easy to understand what the jury meant by their finding on the fifth issue, that there was no improper concealment on the part of the plaintiff, touching his travelling-case. If they meant simply that he did not hide his case of watches in some larger box, or in a bag, or the like, I can understand the finding. But if they mean to say that it was not improper on the part of the plaintiff to carry valuable merchandize with him, without paying the fare which he knew he was liable to for it, and not improper in him to pass such a parcel on the Company, who were ignorant that it was merchandize, as his personal luggage, and thus to induce the Company to carry it for him free of charge, I say if that was what they meant to find, I think their verdict in that respect is *felo de se*, and must come to nothing: and attending to the state of the record, and especially to the matters stated in the twelfth defence, and not traversed, and therefore admitted, I feel it impossible to understand this finding of the jury otherwise than in the way I have last suggested. But it is argued that this finding of the jury is not

necessarily inconsistent with the facts admitted on the record, and that it may well be acted on by the Court, because the jury have, on another issue, found that the case in question was in appearance fit and proper for, and manifestly did contain, merchandize; and it has been contended that, whenever the parcel or package is made up in such a way as to indicate that it is not personal luggage, but merchandize, the non-disclosure by the passenger that his parcel did not contain personal luggage, but merchandize, affords no defence to a Railway Company or other carrier in an action like the present.

Now I can conceive many cases where the luggage of a traveller may be so made up or labelled that no reasonable man could fail to know or suspect at a glance that the package could not be personal luggage, but merchandize; and if a Railway carrier chooses to shut his eyes on such an occasion, and to receive the package of his traveller as personal luggage, when he knows, or has fair grounds for believing, that it is not personal luggage, he may possibly in that case be concluded by his own mode of procedure, and the passenger may perhaps be entitled to call upon a jury to find that there was no improper concealment on his part. Now the question whether there was improper concealment or not is in this case consequential upon the prior question, being whether the Company has fair and reasonable grounds for knowing, or at least for strongly suspecting, that the parcel in question (notwithstanding the omission of the passenger to state what its contents were) was merchandize, and not personal luggage; and such latter question having been answered in the very ambiguous language adopted by the jury in this case, viz., that the case was fit and proper for, and manifestly did contain, merchandize, but that the particular sort of merchandize which it so contained did not manifestly appear, I confess I have great difficulty in considering that a sufficient finding, to support the consequential verdict of the jury that there was no improper concealment on the part of the plaintiff. There was admittedly a non-disclosure by word or deed that the parcel in question consisted of merchandize, unless indeed the appearance of the parcel was such as to bring home such knowledge to the Company; and now, when the jury find that the appearance of this watch-case was not such

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as to bring home knowledge to the Company that it did contain watches (the only species of merchandize we can reasonably suppose or intend it was suited for), what am I to understand by a finding of the manifest fitness or capacity of the box to contain merchandize? But then it is said the jury added that it manifestly did contain merchandize. No doubt, as a matter of fact, we now know that it did contain merchandize; but do the jury mean that the box itself, from its appearance, that is, from all the Railway Company or their servants saw of it, showed that it did contain merchandize, and that it was merchandize that was carried in it on the occasion in question, and not personal luggage? Is that what the jury mean by their finding? or rather is that what we are bound to consider they must have meant? For myself, I cannot understand that to be what the jury intended to express. And now admitting the doctrine laid down in the case in the 8 *Ex.*, I should rather say the principle to be collected from the whole of the case, I must say that, in my opinion, that case is not an authority for the purpose for which it has been cited before us on the part of the plaintiff. In that case the Company were held not liable; and why? because they were not informed, and did not know, as here, that the parcel in question contained merchandize. I am not disposed, upon a somewhat unintelligible and certainly ambiguous finding, as here, to affix a liability on the defendants, by reason of an imputed neglect on their part of an implied, and at best but doubtful, duty, viz.; to inquire whether this box did or did not contain merchandize; and to do that in favour of a party who, with a perfect knowledge of all the facts, neglected on his part to discharge a plain and paramount and prior duty towards the defendants, namely, the duty of disclosing to them that he was carrying with him on their rail a parcel of merchandize *ultra* his personal luggage, the fare for which he had not paid when he took his ticket.

With regard to the obligation of the Railway Company to inquire as to the contents of the different parcels which passengers on their rail take with them as personal luggage, I think we should be cautious how we extend against Railway Companies, in cases of personal traffic, a rule of that kind. I should be slow to hold that a Railway

Company is entitled to require every passenger on their line to disclose to them or their servants the contents of each of his several parcels of luggage; still less, that Railway Companies should be bound, and bound under peril of liability without limit, to make such inquiries. No doubt there may be special or suspicious circumstances that might warrant such an inquiry, or even make it proper and necessary; but as a general rule or general practice it would be intolerable, and would be impracticable in regard to the passenger traffic on Railways: see *Crouch v. The London and North Western Railway Company* (a), which somewhat qualifies two previous cases, one being *Pelly v. Horn* (b), decided in 1828, and the other *Walker v. Jackson* (c), decided in 1842, but neither of them in reference to railway traffic.

Upon the whole, and without touching on the several other points in the case that have been so fully gone into by others, I am of opinion that the judgment below should be reversed.

PIGOT, C. B., concurred with Baron GREENE and Baron FITZGERALD, that the judgment of the Court of Common Pleas should be affirmed.

LEFROY, C. J.

The question here is, whether the judgment of the Court below, in favour of the defendants in Error, is right? I am of opinion that it is not, and that the judgment should have been arrested, as it appears upon the whole record that the plaintiff below has shown no title to sustain the action. The first observation which it occurs to me to make is, that the record contains no allegation or finding, either in terms, or to the effect, that the Companies, having notice of the goods in question being merchandize, undertook the carriage of them as personal luggage. The summons and plaint alleges a contract made with the Companies to carry the plaintiff as a passenger on their line, on payment of the ordinary passenger's fare. No doubt, all the obligation which attaches to the carrying of passengers gene-

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(a) 14 Com. B. 255.

(b) 5 Bing. 220.

(c) 10 M. & W. 161.

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rally likewise attached to the conveyance of such by these Railway Companies. They were, accordingly, bound to carry the plaintiff and his personal luggage safely ; but I do not find any Act of Parliament, or any rule of the Common Law, to the effect that a passenger, by mixing merchandize with his personal luggage, can impose on the Company, without their knowledge or consent, the duty of carrying the merchandize without any extra remuneration, so as to be responsible for the loss of it. But, in my mind, there is further in this case, a specialty arising out of a rule of the Company, of which it is admitted the plaintiff had notice, which would, of itself, disentitle him to recover in this action. With respect to any claim founded on the delivery of the parcel to a servant of the Company, during the course of the journey, it is effectually disposed of by the judgment of Baron Parke, in the case already so often referred to, *The Great Northern Railway v. Sheppard (a)*, in which he says: "It was contended that, after the accident happened, a new special contract was entered into, by which the Company undertook to take care of the plaintiff's luggage ; but that argument fails. If, indeed, an accident had happened to a perfect stranger, and the Company had agreed, without compensation, to forward his luggage, they would, according to *Coggs v. Bernard*, be responsible for its loss ; but in this case the plaintiff was a passenger, and the intention of the Company was only to carry into effect the original contract, and from that alone their obligation arises." As to any claim founded on the allegation of gross negligence, it is disposed of by the finding of the jury, negating that charge. It only remains, therefore, for the plaintiff to establish the liability of the Company, either upon their duty as to passengers generally, or upon some special ground applicable to this case ; and it is upon this that the plaintiff, as I collect, attempts to rest his claim.

The general duty of the Company, as to passengers and their luggage, is clearly and fully laid down by Baron Parke, in the case already referred to. He says—"In this case, there being no special contract, the defendants were bound to carry the plaintiff and his luggage ; which term, according to the true modern doctrine on the

(a) 8 Exch. Rep. 30.

"subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience; perhaps even a small present or book for the journey might be included in the term, but certainly not merchandize or materials brought for the purpose of being manufactured." He then cites the authorities, and adds—"In this case nine-tenths of the articles were of the latter description." I may say, in the present case, all the articles for which the plaintiff has recovered damages were merchandize. Baron Parke then proceeds to state what may be called a qualification or exception to the general rule so laid down, and it is upon this the plaintiff has endeavoured to sustain his case. The qualification, as laid down by Baron Parke, is in these words:—"Now, if the plaintiff had carried these articles *exposed*, or had packed them in the shape of merchandize, so that the Company might have known what they were, and had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss." The general rule, with its exception, is again laid down by the learned Baron, in a subsequent part of his judgment, where he says:—"The defendants only agreed for the stipulated fare to carry passengers, and every thing which constituted personal luggage. They were not bound to carry merchandize or articles wholly unconnected with luggage. If, indeed, they had notice, or might have suspected, from the mode in which the parcels were packed, that they did not contain personal luggage, then they ought to have objected to carry them; but the case finds that they had no notice of what the packages contained." I may observe, in passing, that what was found in that case is admitted in this, on the face of the record viz., "that the defendants had no notice or knowledge whatsoever that the personal luggage was merchandize." The rule is laid down in nearly the same terms by the learned Judge, in the observations which fell from him, in the course of the argument, when the case first came before the Court. He says (p. 33), "It does not appear that the Company knew that this luggage was merchandize;" and again (p. 34), "The simple point is, whether, if merchandize be taken as part of the personal luggage of a third-class passenger,

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"the Company are responsible. If the articles had been carried openly, so that it might have appeared that they were merchandize, the Company, if they undertook to carry them, would be liable for their loss; but why should they be so, when they did not know what the parcels contained, and, therefore, had no opportunity of bargaining for any extra charge?" Three things are clear from this judgment; first, that a passenger has no right, for a passenger's ticket, to carry merchandize as part of his personal luggage, without extra payment; secondly, that if he does so, he does so at his own risk, unless he can establish that the Company had notice (that is knew, or might have known) that the articles he so carried were merchandize; and, thirdly, that the Company, with this knowledge, chose to treat them as personal luggage, and to carry them without any extra remuneration; but the onus of establishing this rests upon the passenger, to entitle him to fix the Company with responsibility. Alleging and proving this notice I take to be essential to entitle him to recover in this action. The defendants appear to me to have shaped their defence in conformity with the law as laid down in the case referred to. Whether the plaintiff has given an answer to that defence by his replication, and the finding of the jury, is now the question in this case. The defendants state, in that defence, "That they were carriers of passengers for a certain fare, and of merchandize at certain rates, to be paid in that behalf; that passengers were entitled to carry their personal luggage free of any charge beyond the fare, but were not entitled to carry with them any merchandize, without paying an extra fare for the carriage of such merchandize; that the plaintiff had notice thereof, before the delivery of the goods in question; that he was a passenger on the said Railway, and took with him the said travelling-case and its contents as his personal luggage, without paying any extra fare for the same; that they constituted merchandize, of which he had notice, but of which the defendants had no notice or knowledge whatsoever, and, save as aforesaid, that the said case and its contents were not received by defendants as common carriers or otherwise."

To this defence the plaintiff filed a replication in which he says that

“the travelling-case was fit and proper for the conveyance of,
 “and manifestly did contain, such merchandize, to wit, watches,
 “and not personal luggage, as in the summons and plaint mentioned; and that there was no improper concealment or fraud
 “on the part of the plaintiff, touching said travelling-case, and
 “the defendants received said travelling-case, and the watches
 “therein contained, as a part of the personal luggage of the
 “plaintiff, without making any objection thereto.” On this replication, the jury found “that the case was in appearance and
 “in fact fit and proper for, and manifestly did contain, merchandize,
 “but that the particular sort of merchandize did not manifestly
 “appear, but found that it contained watches,” and found, on another issue, “that there was no improper concealment on the part of
 the plaintiff, touching said case.” Let us now consider the effect
 of this defence and replication, before I come to the finding
 of the jury. I need scarcely call attention to the rule that every
 allegation in the defence, not traversed and denied, or confessed
 and avoided, must be taken as admitted. Now as there is no
 traverse or denial of the several statements therein, it stands
 confessed by the plaintiff that he took with him, as part of his
 personal luggage, the goods in question, without paying any extra
 fare for the carriage thereof, though he was not entitled on a
 passenger’s ticket to do so, and had notice thereof; that he knew
 they were merchandize, but that the defendants had no notice or
 knowledge whatsoever thereof. Now I apprehend this is a perfect
prima facie case disentitling the plaintiff to recover, unless it be
 avoided by some matter in the replication, which is substantiated
 also by the finding of the jury; and what alone can relieve him
 from that difficulty? Nothing short of alleging and proving that
 the Company had notice that what was brought by him as personal
 luggage was in fact merchandize, and that, with this notice, they
 chose to treat it as personal luggage, and carry it without further
 remuneration. But neither the replication nor the finding accomplishes this object. There is neither an averment nor a finding
 that the Company knew or had notice (express or implied) that
 what was brought by the passenger as personal luggage, and carried

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as such, was merchandize. On the contrary, he shrinks from traversing the averment in the defence, and therefore admits it, that the Company had no notice or knowledge whatsoever thereof. He does not in his replication venture to aver in the most general terms that the Company knew, or might have known, that this was merchandize. He does, indeed, aver that the case contained merchandize, but he carefully avoids alleging that the Company knew this, which is the essential point in the case. He does not allege, nor was there any finding, that the Company agreed to treat as personal luggage this merchandize, or to carry it without further remuneration. It is also further observable, that the denial of any fraudulent concealment does not extend to the contents, the concealment of which was the essential fact, and the finding is equally limited.

It has indeed been argued that it was the duty of the Company to have made inquiry into the contents of the case, and that, not having done so, they are liable for the loss, although it turn out to be merchandize; and this has been argued upon the authority of the cases of *Pelly v. Horne* (a); *Walker v. Jackson* (b). But these cases apply only to contracts for the carriage of goods; and it appears from them that the carrier is protected (c) by a notice, to the owner of the goods, of a limited responsibility. But the present case is a contract for the carriage of a passenger and his luggage only, with notice to the passenger that the Company would not carry merchandize, as part of his luggage, without extra payment. When these cases were pressed on Baron Parke in the course of the argument, he said, "No doubt, it is the duty of the carrier to ask such questions as may be necessary; and if he asks no questions and there be no fraud, he is liable for the loss. It was so laid down in *Walker v. Jackson*; but in this case the contract was to carry passengers and their luggage; then if the Company had notice that a passenger brought with him goods which were not luggage, and they chose to carry them, they would be responsible; but if no notice is given, there is an

(a) 6 Bing. 222.

(b) 10 M. & W. 161.

(c) See especially *Batson v. Donovan* (4 Bar. & Al. 21).

"unfair concealment, which prevents them from making a charge
"as for merchandize." How much stronger is the present case
against the plaintiff, who, aware of the Company's rule, took only
a passenger's ticket, thus holding out to them that he had no
merchandize in his luggage, of which it now stands admitted they
had no knowledge? It is not necessary for the Company to establish
against the plaintiff a case of fraud; it is for him to establish
against them a case of responsibility. There is an observation
of Baron Parke, towards the close of his judgment, which is very
relevant to this topic; he says, "Whether this was done for any
"fraudulent purpose, it is not necessary to inquire; for even if
"there was no fraudulent intent, the plaintiff so misconducted
"himself, that the Company were not aware that he was carrying
"merchandize, and therefore the loss must be borne by him:"
and such, in my opinion, ought to be our decision in this case.

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Judgment affirmed.

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Queen's Bench

THE QUEEN v. DANIEL M'CARTIE, and several others.*

THE QUEEN v. DENIS O'SULLIVAN, and several others.

April 19, 20.

May 4.

(Queen's Bench.)

Prisoners arrested in December were committed to gaol in the January following, on a

charge of treason-felony, under the 11 & 12 Vic., c. 12. At the Spring Assizes, in the following March, indictments for treason-felony having been preferred and found against the prisoners, they were arraigned, pleaded not guilty, and were ready to proceed with their trial; whereupon the Attorney-General, on the part of the Crown, applied to the Judge of Assize to postpone the trial to the next Assizes. This application, which was not grounded on affidavit disclosing any cause for the postponement, was granted, without discussion, by the Judge, who ordered that the prisoners should in the meantime be kept in custody. Upon motion, in the next Term, to admit the prisoners to bail, *Held*—

Per LEFROY, C. J., and HAYES, J., that the Court, in the exercise of its discretion, ought not to grant the motion.

That a prosecutor, in cases of felony, has, by the Habeas Corpus Act, one Term or Session, after the commitment of the prisoner and his prayer under that Act, to prefer an indictment against the prisoner, and another Term or Session to bring on the trial: that, if the prisoner is not indicted in the first Term or Session after committal, he is entitled to be bailed; and, if he is not indicted in the first, and tried in the second Term or Session after committal, he is entitled to an absolute discharge.

Sed, per PERRIN and O'BRIEN, JJ., that the Court, in the exercise of its discretion, ought to grant the motion, the trial of the prisoners having been postponed on the application of the Attorney-General, on the part of the Crown, without any ground being shown for such postponement.

The Court of Queen's Bench has full discretionary power to admit to bail, in all cases, no matter how serious the offence charged may be.

Where an indictment for felony has been found against a prisoner at one Assizes, there is no prerogative or absolute right in the Crown to postpone the trial; such postponement is the act of the Court, in the exercise of its discretion. There is no difference between the law in England and Ireland in this respect; and, *per* LEFROY, C. J., and HAYES, J., an application to the Court for that purpose is not necessarily grounded on affidavit; *sed, per* PERRIN and O'BRIEN, JJ., such grounds ought to appear by affidavit, or otherwise upon oath.

The question, in bail motions, is the likelihood of the prisoner being forthcoming to take his trial, if admitted to bail; and the elements to be considered in the determination of that question are, first, the nature of the offence charged; second, the character of the evidence against the prisoner; and, third, the punishment which, in the event of conviction, may be inflicted on the prisoner.

The right of ordering jurors to stand by, in cases of misdemeanour, may be exercised by a private prosecutor equally with the Crown: *Regina v. M'Gowan* (Ct. Crim. Ap., E. T. 1858).

* The publication of this case has been unavoidably delayed.

11 *Vic.*, c. 12, s. 3, as being members of an illegal society called "the Phoenix Club." The facts, so far as they are material to the case, appear fully in the judgments.

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T. O'Hagan (with him *E. Sullivan*) now moved that the prisoners in the Cork gaol be admitted to bail. They argued that this was a bailable offence, and denied the right to postpone the trial of a prisoner against whom a bill of indictment had been found, except upon affidavit disclosing sufficient grounds to satisfy the Judge at the trial that such postponement was necessary; and they cited the following authorities:—2 *Inst.*, p. 42; *Regina v. Scayfe* (a); Habeas Corpus Act, 21 & 22 G. 3, c. 11 (*Ir.*); *Rex v. Scully* (b); *Barronet's case* (c); *Regina v. Woods* (d); *Regina v. Gallagher* (e); *Rex v. Morgan* (f); *Rex v. Poynes* (g).—[PERRIN, J., referred to *Rex v. Jackson* (h)].

The *Attorney-General** (with him *Sir Colman O'Loughlen* and *A. Vance*), for the Crown, resisted the motion, and contended for the rights of the Attorney-General for Ireland to postpone the trial of a prisoner, without assigning any reason for so doing. They distinguished the practice in Ireland from that in England, and cited the following authorities:—2 *Hayes, C. L.*, 2nd ed., p. 866; *Regina v. Chapman* (i); *Regina v. Owen* (k); *Regina v. Guttridge* (l); *Regina v. Bowen* (m); *Barronet's case* (n); *Re Robinson* (o); *Regina v. Andrews* (p); Irish Habeas Corpus Act, 21 & 22 G. 3, c. 11; 60 G. 3, and 1 G. 4, c. 4, s. 9; *Regina v. Maginniss* (q);

(a) 9 Dow. P. C. 553; S. C., 5 Jur. 700.

(b) 1 Cr. & Dix, C. C., 168.

(c) 1 El. & Bl. 1; S. C., 17 Jur. 184. (d) 9 Ir. Law Rep. 71.

(e) 7 Ir. Com. Law Rep. 19; S. C., 8 Ir. Com. Law Rep. 93.

(f) 1 Bulst. 84.

(g) 3 Bulst. 113.

(h) 25 How. St. Tr. 783, 794.

(i) 8 C. & P. 558.

(k) 9 C. & P. 83.

(l) 9 C. & P. 228, 471.

(m) 9 C. & P. 509.

(n) *Supra*.

(o) 23 Law Jour., Q. B., 286.

(p) 2 D. & Low. 11.

(q) 5 Cox, C. C., 511.

* J. Whiteside.

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E. Sullivan replied.

J. Clarke (with him *J. Coffey*) made a similar motion on behalf of the prisoners in gaol in Kerry.

The *Attorney-General* (with him *Sir Colman O'Loughlen* and *A. Vance*), for the Crown.

J. Coffey replied.

Cur. ad. vult.

HAYES, J.

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In these cases, applications have been made to the Court that the defendants should be admitted to bail. The applications are addressed to the Common Law jurisdiction of this Court, and are grounded on affidavits of the prisoners, and of their attorney in one of the cases, which affidavits are offered in order to satisfy the Court that, if bailed, the prisoners will be forthcoming at their trial; and, as an additional inducement, the defendants insist that, by reason of the course pursued in the Court below, according to which their trials were postponed, and themselves detained in custody, they have suffered a hardship which should now recommend them at least to the favourable consideration of the Court.

The short facts are these:—In the month of December last, the prisoners, with several other persons, were arrested, on a charge of treasonable practices, contrary to the Act 11 & 12 *Vic.*, c. 12, commonly called the Treason-felony Act. Some of the persons so arrested were admitted to bail by the Magistrates; but the applicants, together with one Daniel Sullivan, were fully committed for trial at the then ensuing and now last Assizes for the counties of Kerry and Cork respectively. In February last, after the close of

(a) Comb. 111.

(b) 17 How. St. Tr. 398.

(c) 1 Dears. C. C. 60.

Hilary Term, an application was made in Chamber to admit the Cork prisoners to bail; but the matter having been discussed, no rule was made, as Counsel for the prisoners thought it right to withdraw the motion. At the last Assizes, indictments were found by the grand juries of Kerry and Cork against the prisoners in the gaols of those counties respectively, charging them with having compassed and intended to depose Her Majesty, and to levy war against her, an offence which subjects the party to penal servitude for life. In the indictment against the Cork prisoners was joined a person named Patrick Downing, one of those who had been admitted to bail, and who is now standing out on his original recognizance.

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At the Kerry Assizes, which were held on the 8th of March, the prisoners for trial there having refused to join in their challenges, only one of them (Daniel Sullivan) was put on trial; and, after an investigation which lasted for seven days, and in the course of which about fifty witnesses were examined for the Crown, the jury disagreed, and were discharged, without giving a verdict. The Assizes were then adjourned to the 30th of March. In the interval the Cork Assizes were held, and the indictment having been found by the grand jury there, and the defendants in custody in that county having pleaded thereto, on the 17th of March, the *Attorney-General*, who attended in person to prosecute, informed the Court that he did not intend to proceed with that indictment at the then present Assizes, and moved that the trial should be postponed to the next Assizes. Accordingly, an order was made that the trial should be postponed; and it was further ordered that the prisoners should, in the meantime, be kept in custody. This order was made by the presiding Judge, at the instance of the *Attorney-General*, and without any affidavit to ground the motion.

On the 30th of March, proceedings were resumed at Kerry, pursuant to adjournment. The prisoner Daniel Sullivan was again put on trial, and, having been convicted, was sentenced to ten years' penal servitude. After this conviction, the *Solicitor-General*, on the part of the Crown, announced that no other person would be then put on trial, and moved the postponement of the trial of the

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other prisoners until the next Assizes. This motion was acceded to by the learned Judge who presided, though not grounded on any affidavit; and, an application having then been made on the part of the prisoners that they should be admitted to bail, the learned Judge declined to accede to it, referring the matter to the consideration of this Court, which was then in about a fortnight to resume its Sittings at the commencement of the present Term.

In this state of things, the present applications have been made grounded on affidavits, in which it is alleged that the applications for postponement of the trials were made by the law officers, without any reason assigned by affidavit, and in assertion of a prerogative right; that they were made without any previous intimation to the prisoners, who were then ready for trial, and who had incurred a very serious expenditure in preparation, all of which had thus become abortive.

An affidavit to resist the motions has been made by Sir Matthew Barrington, the Crown Solicitor, in which he sets out the form of oath which was proved at the trial in Kerry to have constituted the bond or obligation of the treasonable association and company which, he says, prevailed extensively in the counties of Kerry and Cork, and with which the prisoners are charged to have been connected. There can be no doubt of the treasonable character of that document.

It is beyond all dispute or controversy, that this Court, as the highest tribunal of ordinary criminal jurisdiction in the realm, and held, as it is said, before the Queen herself, has full power to admit to bail, no matter how serious the offence may be, murder, or treason itself not excepted. For this I refer to 4 *Inst.*, p. 71; 2 *Hale, P. C.*, p. 129; *Farington's case* (a); *Harvey of Comb's case* (b); *Morgan's case* (c); and the very late case of *The Queen v. Barronet* (d). It is true, that in *Comb.*, p. 111, which has been cited for the Crown, it is said that bailing for high treason is "a special favour, and not done without the consent of the Attorney General." I regard this, however, as a salutary safe-

(a) T. Jones, 222.

(b) 10 Mod. 334.

(c) 1 Bulst. 84.

(d) 1 El. & El. 1.

guard required by the Court in the exercise of its transcendent powers, rather than as a limitation and restriction of those powers.

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But while this authority was wielded by the Court of King's Bench, guided solely by its legal discretion in each case, the powers of other inferior tribunals were, up to the passing of the Habeas Corpus Act, confined within very narrow limits, so that, in any grave or serious charge, it was only after the expenditure of much time and cost that relief could be obtained through the intervention of this Court. The natural result of this state of the law was, that persons were often put in prison upon grave charges to be sustained by little, if any, evidence, and, being thus deprived of liberty, were, in their efforts to recover it, deprived of fortune also; while their prosecutors, having attained their ends by the incarceration of their victims, were content to let them remain in gaol to abide the tardy and uncertain interference of this Court, without any effort on their part to expedite the trials. These were among the evils which it was proposed to remedy by the Habeas Corpus Act.

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But, it may be asked, would a sufficient remedy not have been applied by the commission of gaol delivery? The answer is, that, at that period of our history, commissions of gaol delivery were not sped with the regularity and frequency of modern times; and it is not improbable that a very weak excuse for not proceeding with the trial, when assigned by the law officer of an arbitrary Prince, would have sufficed to determine the discretion of a Judge who held his own place at the pleasure of that Prince. Besides, as it was held in *Platt's case* (a), that the Court of Gaol Delivery was competent only to deliver those whom it was competent to try, and had no power to bail in cases of high treason. What then was the remedy proposed by the Habeas Corpus Act for delays in criminal prosecutions? Simply this; that, after the prisoner's prayer on the first day of an Assizes to be brought to trial, the prosecutor should be obliged to have him indicted at that Assizes, and tried at or before the next Assizes, unless he could upon affidavit show good cause for his delay; and if he failed to

(a) 1 Leach, C. C., 157, 168.

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do so, the prisoner would be released from gaol, not as a matter of discretion or of favour, but of absolute right, which his Judges were bound to concede: *Rex v. Yates* (a). Can it be said that this enactment did not afford a great security for the liberty of the subject, by thus assigning a reasonable period within which, if the prisoner were vigilant in his own behalf, he *must* be brought to trial or released from custody?

It appears to me that the assignment of this period amounts to something like a statutory declaration that, in the absence of any special reason to the contrary, the prosecutor, having had his vigilance excited by the prayer of the defendant in open Court, should be allowed that period for preparing and getting up the case of the Crown, without having the safe custody of the prisoner interfered with.

As instances of the special reasons which have induced the Court, in its discretion, to interfere, by bailing a prisoner who had not brought himself within the provisions of the Habeas Corpus Act, I may mention a danger to the life of the prisoner, by reason of his further confinement: *Aylesbury's case* (b); evidence that the prosecution has been instigated by malice: *Barney's case* (c); *Rex v. Jackson* (d); or an unreasonable delay, though the prisoner may have omitted to make his prayer: *Rex v. Wyndham* (e); or that the charge against the prisoner has been varied after his commitment, and after his prayer made, in a manner calculated to deprive him of the benefit of the statute: *Crosby's case* (f). On the other hand, to show the reluctance which the Court has felt in shortening the statutory period, to the prejudice of the prosecutor, I may refer to *Kirk's case* (g). There, Captain Kirk and one Cage were indicted for the murder of Mr. Conway Seymour, and, in the first Term after the commitment, they applied to be bailed; but, though the case was supported by affidavit, and no affidavit appears to have been made to resist the motion, yet the Court unanimously refused

(a) 1 Show. 193.

(b) 1 Salk. 103.

(c) 5 Mod. 323.

(d) 2 Hawk., P. C., c. 15, s. 79.

(e) 1 Str. 2; 8. C., 3 Vin. Abr. 515.

(f) 12 Mod. 66.

(g) 12 Mod. 304.

to bail, because the prisoners, having surrendered, as I read the case, after the indictment found against them, neglected to give timely notice to the prosecutor of the fact; the Court saying that, as this is good reason for deferring their trial, so it is also the same for not being bailed. Again, in the case of *Rex v. Delamere* (a), it was moved to bail the prisoner, under the Habeas Corpus Act, by reason of his not having been prosecuted within the Term after his commitment; the Court decided against him, on account of the irregularity of his prayer, and say, "that the discretion of bailing, which the Court had before, is now restrained by that Act;" plainly conveying, as I apprehend, that the Court will not interfere within the statutory period, unless for special cause shown upon affidavit, and that, after that period, it will require a special case to be made by affidavit, on the part of the Crown, to warrant the detention of the prisoner in custody. I may here advert also to an *Anonymous case*, headed *Habeas Corpus* (b), where Lord Mansfield, on a bail motion by one committed for highway robbery, "ordered the prisoner to be "remanded, and not entitled to bail, being committed, not on suspicion of felony, but on express charge of felony on the face of the "warrant; and, therefore, not to be bailed, unless particular circumstances had been shown."

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I now come to the Irish case of *Rex v. Scully* (c), which has been cited for the defendants. In that case, as in this, the prisoner was made amenable in December, and indicted at the following Spring Assizes, after which, the indictment being found, an application was made for postponement of the trial. It is true this application was founded on an affidavit; but the Court, at the close of the judgment, plainly intimates that the affidavit was unnecessary, and that the result would have been the same, even though no such affidavit had been made; thus concurring in the view which I have put forward as the result of the cases in England, that an affidavit of special facts was not necessary on the part of the Crown, until the onus had shifted on the Crown, by the lapse of the statutory period for prosecution. But there, Chief Justice Bushe says, that

(a) Comb. 6.

(b) Loft. 280.

(c) 1 Cr. & D., C. C., 168.

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it was discretionary in the Court to postpone the trial or not, and that the Crown had no right to have it postponed. In using these expressions, I think that very learned Judge merely intended to convey that the period mentioned in the statute might be interfered with and shortened, in case special facts and pressing circumstances should be adduced on the defendant's affidavit, to inform and guide the legal discretion of the Court in admitting him to bail.

The case of *Rex v. Jackson* (a) has been cited. There the prisoner was committed on a charge of high treason, on the 28th of April 1794, and he was arraigned upon his indictment on the 30th of June 1794. No prayer was put in under the Habeas Corpus Act; and it was at the instance of the Crown, and without any opposition on the part of the prisoner, that the trial was fixed for the 7th of November. When that time arrived, an application was made by the prisoner for a further postponement, grounded on an affidavit of the absence of his Counsel and witnesses. The Court fixed a day in the next Term, and it was at this day that the Crown again moved to postpone the trial, on affidavit of the detention of an important witness in England; and, in giving judgment, Lord Clonmel says that, "It never was of course, and it ought not to be of course, to postpone a trial on the part of a prosecutor: and one reason was this; if the prosecutor's witnesses die, what they have said is not lost, having given examination before; if the prisoner's witnesses die, he is undone; and, therefore, it is not to be considered a matter of course." Now, it may be remarked here, that there had been no prayer under the Habeas Corpus Act. Indeed that Act had not been once mentioned or referred to, and the position laid down by the Chief Justice is quite indisputable, when applied to the circumstances of that case, which was not brought to trial until just one year after the prisoner's commitment. The reason assigned by his Lordship existed before the Habeas Corpus Act; and, therefore, must be understood as having been within the contemplation of the Legislature in passing it.

I think it not inappropriate here to cite a passage from the judgment of Parker, C. J., in the case of *Rex v. Wyndham* (b), which I

(a) 25 How. St. Tr. 783, 802.

(b) 3 Vin. Abr. 533.

have already referred to. His Lordship says, "That had Sir William Wyndham made a prayer the first day of this Term, and it had appeared that the matter did arise in another county, the Court could not have bailed him by the Habeas Corpus Act; but they were not then upon that Act, but at Common Law. He said, that they were entrusted with the liberties of the subjects of England, and, as they were bound, on the one hand, to take care of them, so they there were, on the other hand, to take care of the Government, that a person might not escape justice, where there was a due prosecution against him; that he would have taken Mr. Attorney-General's word, if he had said, at the Bar, that he would certainly have indicted Sir W. Wyndham; but there not being anything of that in this case, they were all of an opinion to bail him." A somewhat similar position will be found in *Rex v. Fitzgerald* (a). Upon the whole, then, it appears to me, upon a consideration as well of the English as well as the Irish authorities, that the same law prevails in both countries; and that, without alleging anything in the way of prerogative, but resting this part of the case on the Habeas Corpus Act, and the true legal construction of it, the prosecutor, in a case of felony, has one Term or Session after the commitment of the prisoner, and after his prayer, under the Habeas Corpus Act, to prefer his indictment, and he has another Term or Session to bring on the trial, and that this period ought not to be restricted or interfered with, against the consent of the Crown, save upon special cause, to be assigned by affidavit on the part of the prisoner. If the prisoner has failed to make his prayer under the Habeas Corpus Act, or to set forth, upon affidavit, the facts on which he relies for relief, he has no reason to complain, if the Court should, on perusal of the informations or finding of the grand jury, and without any affidavit on the part of the Crown, think it right to order the postponement of the trial, and that he should still remain in custody. All this, be it remembered, is the act and order of the Court, not the prerogative of the Crown or its officers. This being so, I cannot understand why or how the order of the Court, if we should here admit it to

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(a) 1 Wils. 254.

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have been an erroneous one (which, however, I am very far from doing), could, in any way, affect our decision on this motion. What the Court did on that occasion appears to me to be wholly beside the present question; and, perhaps, I owe an apology for having occupied so much time in discussing the proceedings in the Court below. I have been mainly induced to do it, because it was intimated at the Bar that a different practice prevailed in the two countries; that a prerogative was asserted in Ireland which found no place in England; and that the consequence was, that, in this country, the liberty of the subject was unduly interfered with.

I now come to what I take to be the true question for our decision here, viz., whether, apart from all considerations as to what took place in the Court below, this Court ought now, in the exercise of its Common Law powers and discretion, to admit the prisoners to bail?

The principle on which this is to be determined has, in my mind, been very accurately laid down, both in England and Ireland: in England, in the cases of *Rex v. Seafie* (a), *The Queen v. Barronet* (b); and in Ireland, in *Regina v. Woods* (c); *Regina v. Gallagher* (d); viz., whether the party, if bailed, is likely to be forthcoming at his trial? and in considering this, three matters present themselves:—first, the nature of the offence charged; secondly, the character of the evidence against the prisoner; thirdly, the punishment that may be inflicted. I need not dwell on the enormity of the offence charged. It is high treason itself, though the Crown may have thought it right, under the late statute, to prosecute as for an ordinary felony, thus exempting the prisoners, on this prosecution, from any risk of the capital punishment which would follow on a conviction for treason; but subjecting them, on conviction, to the very highest secondary punishment. Then as to the presumption of guilt attaching to the prisoners. It is not desirable, on a motion of this kind, to discuss very minutely the evidence against the prisoners. Suffice it to say, we have the depositions of the

(a) 9 Dowl., P. C., 953; S. C., 5 Jur. 700.

• (b) 1 El. & Bl. 1.

(c) 9 Ir. Law Rep. 71.

(d) 7 Ir. Com. Law Rep. 19.

several witnesses, taken by the Magistrates, for which they have thought it right to commit the prisoners. But, besides that, we have the finding of a grand jury on the case, thus constitutionally asserting the legal position that, in the opinion of that tribunal, and in the absence of evidence for the prisoners, they ought to be convicted of the full charge set forth in the indictment against them. The cases cited at the Bar, from the 8th & 9th vols. of *Car. & Payne's Reports*, to which I may add the case of *Regina v. Andrews* (a), show what weight and importance is given in England to that circumstance. Besides this, there is a peculiar circumstance in this case, which cannot fail to affect the mind very strongly. The offence charge is, as I have said, the compassing to dethrone the Queen, and, among the overt acts laid, is a conspiracy to bring in foreign troops. Conspiracy being thus the gist of the offence, as soon as that shall be proved, everything said or done by one of the conspirators, in furtherance of the common purpose, becomes evidence against all of them. This being the state of the law, what is the fact? viz., that a jury has already, by its verdict, pronounced on the existence of the very conspiracy charged in the indictment, thus affording the sanction of a verdict to a very important portion of the case against the prisoners.

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Having regard to all these matters, and recollecting that the issue of a trial might possibly be to subject the prisoners, if convicted, to penal servitude for life, I am not satisfied that, to use the words of Mr. Justice Burton (b), "by granting the application there would be no danger of the prisoners not being forthcoming on the trial;" and, in the language of Mr. Justice Crampton, in the same case, "I think that the enormity of the offence is such that a mere private security will not be sufficient" (c). It is impossible for us here to speculate upon the several shades of guilt which may be proved against each of the prisoners on the trial; but, under all the circumstances, it appears to me that bail ought not to be taken, save as to the persons with respect to whom the Crown has given its consent at the Bar.

(a) 8 Jur. 779; S. C., 2 Dow. & L. 10; 13 L. J., M. C., 113; 1 New Ses. Cas. 199.

(b) *Regina v. Wood* (9 Ir. Law Rep. 71, 72).

(c) p. 73.

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In this case I am of opinion that the application made by the prisoners now confined in the county Cork gaol, to be admitted to bail, should be complied with. It is requisite to consider, in the first place, the important question which has been raised in the course of the discussion, as to the absolute right of the Crown, where bills of indictment for felony have been found against prisoners, to postpone their trial to the next Assizes, without assigning any reason. The existence or non-existence of that right has, in my opinion, a material bearing upon this case; because it has been held that delay upon the part of a prosecutor in not bringing a prisoner to trial, if not satisfactorily accounted for, is one of the important circumstances to be considered in deciding whether such prisoner should be admitted to bail. The question is also material as affecting the general administration of the criminal law. If such a privilege on the part of the Crown has been established by law, or by that invariable course of practice which may acquire the force of law, then, of course, until altered by the Legislature, it should be conceded by the Court, however objectionable it may be, and though it would give to those acting for the Crown a power susceptible of great abuse. Such a power might, in various cases, be exercised arbitrarily or capriciously, and produce results most injurious to the prisoners, who, though prepared for their defence at the time expected for their trial, may, if that trial be postponed, be disabled by poverty, or the death or absence of their witnesses, or other causes, from defending themselves with the same effect at a future time. Even if the trials so postponed should ultimately terminate in an acquittal the prisoners, if not admitted to bail (which, from poverty, they may be unable to procure), would, in the meantime, suffer a prolongation of their imprisonment, upon a charge not afterwards established against them. It is a recognised principle of our criminal law, that a prisoner should have the question of his guilt or innocence determined upon the first suitable opportunity; that his punishment should not, by an unnecessary prolongation of his imprisonment before trial, precede his conviction: and any claim

of privilege, opposed to or interfering with that right, should be strictly investigated. It is true that cases frequently occur in which, from various causes, the postponement of the trial is essential for the due administration of justice. But, in order to meet the emergency of such cases, it is not necessary that the privilege contended for should exist in the Crown. The power of postponing a trial, when it is requisite and advisable so to do, may safely be confided to the discretion of the Court, to be exercised upon considering the circumstances of each case, and would, in my opinion, be more properly confided to that tribunal than to the arbitrary discretion of the prosecuting Counsel.

Let us now consider upon what grounds this privilege is claimed. It is not given by statute, nor is it to be implied from any supposed analogy to the provisions of the Habeas Corpus Act. That Act does not recognise the existence of such a privilege; it was, according to its title, "An Act for the better securing the liberty of the subject," and it would be difficult to rely on it as an Act abridging the subject's rights. The next question is, whether the existence of this privilege has been established by authority and judicial decisions? but, during the elaborate argument we have heard, no reported case has been cited to that effect. I am aware that an opinion has generally prevailed and been acted on among the legal profession of Ireland, of the existence of this right in the Crown, and that the right, when claimed, has been usually recognised by our Judges, and has been without discussion generally yielded to by the prisoner, either from a belief in its existence or from some of those obvious reasons which may induce him not to force on his trial. It appears, however, from some cases to which I shall refer, that this opinion and practice, though general, has not been invariable; and even if it were, the decision of the House of Lords, in the case of *Gray v. The Queen* (a), shows that such prevailing practices and opinions would not be sufficient to establish against a prisoner a privilege which might be so arbitrarily and oppressively exercised as that now claimed. In that case the majority of this Court had decided (b)-against the right of a prisoner to challenge jurors per-

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(a) 6 Ir. Law Rep. 492.
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(b) 6 Ir. Law Rep. 259.
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emptorily in cases of non-capital felonies; my Brother PERRIN alone was in favour of that right. It was urged in the arguments before this Court and the House of Lords, that the uniform course of practice in Ireland had been to refuse the right of challenge; and yet, upon the writ of error, the House of Lords, with the concurrence of all the English Judges (except one), reversed the decision of this Court, though it was in accordance with a practice more general and uniform than can be relied on in the present case. The question now before us does not, however, rest merely upon the absence of authority in support of the privilege contended for; because there are cases in this country in which the existence of such a privilege has been discussed and denied; and a reference to the English authorities will show a course of proceeding in England inconsistent with its existence there. Our attention was directed by my Brother PERRIN, during the argument, to an important case before this Court, that of *The King v. Jackson* (a). In that case an indictment for high treason was found in June 1794; the trial was then postponed, with the concurrence of the Crown and of the prisoner, until November 1794. It was then further postponed until January 1795, on the application of the prisoner's Counsel, on the ground of the absence of his witnesses; and in January 1795, an application for a *third* postponement was made by the Crown, upon an affidavit of the absence of material witnesses. This application was opposed by the prisoner, and argued before Lord Clonmel, C. J., and Downes and Chamberlain, JJ. The general question of the right of the Crown to postpone a trial, without assigning any grounds, was discussed at some length, and the existence of such a right was denied by Lord Clonmel. In part of his judgment he expresses himself to the following effect:—"It has been truly said (and I shall ever hold "it as my opinion, and have done so for twenty years, the first time "I took it up was upon consultation with Chief Justice Patterson, "when the question was considered by a variety of persons in case "of Whiteboys), that it never was of course, and ought not to be "of course, to postpone a trial on the part of a prosecutor. And one "reason was this, that if the prosecutor's witnesses die, what they

(a) 25 How. St. Tr. 783.

“ have said is not lost, having given examinations before ; but if the
 “ prisoner’s witnesses die he is undone ; but the rule in those cases
 “ must be governed by circumstances” (a). Lord Clonmel then
 proceeded to discuss the facts of the case, and to show why the appli-
 cation for the postponement should be granted by the Court. In
 observing upon that case, the *Attorney-General* has relied upon the
 circumstance of there having been previous postponements of the
 trial, and contends that the observations of Lord Clonmel should be
 considered with reference to that fact ; but it appears that the first
 postponement was by consent, and was matter of arrangement
 between the prisoner and the Crown, and almost at the prisoner’s
 suggestion, and that the second postponement was expressly at the
 prisoner’s instance ; and, if the privilege now contended for did exist
 in the Crown, the right to exercise it would not have been lost by
 previous postponements made under such circumstances. Although,
 however, the facts of that case were different from the present, and
 did not expressly raise the questions now under discussion, we
 should not, therefore, disregard the observations of Lord Clonmel
 in his judgment, acquiesced in by the other Members of the
 Court, in which he expressly denies the existence of the privi-
 lege contended for, and stated not merely his own opinion upon
 that argument, but the opinion which had been uniformly held
 by himself and other Judges. The next Irish case to which
 we have been referred is that of *The King v. Scully* (b). In that
 case the prisoner was arrested in December, charged with what was
 then a capital felony ; the indictment was found at the following
 March Assizes (dates nearly similar to the present), and the Crown
 Counsel applied to postpone the trial, on an affidavit stating the
 absence of a material witness, for whom diligent search had been
 made, and that further evidence was expected. In giving judgment
 in that case, Bushe, C. J., expresses decidedly his opinion against
 the existence of the right now contended for by the Crown. His
 judgment is to the following effect :—“ That it was discretionary in
 “ the Court to postpone the trial or not. That, on the one hand, the
 “ Crown had no right to have the trial postponed ; and, on the other,
 “ the prisoner had no right, on the first Assizes after being made

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(a) p. 802.

(b) 1 Cr. & D., C. C., 168.

E. T. 1859. "amenable, to call for a discharge upon bail or otherwise, unless
Queen's Bench "two circumstances concurred; viz., first, that he should remain
 THE QUEEN "unindicted at those Assizes; and, secondly, that he should, on the first
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There have been other cases in Ireland (though not reported) in which this right has been claimed by the Crown, but not conceded by the presiding Judge. My Brother PERRIN has referred to a case to that effect before Fox, J., and he has himself acted similarly on various occasions. The same principle was recognised by Pigot, C. B., at the Cork Spring Assizes of 1855, in the case of *The Queen v. Connor* (a), in which I was prosecuting Counsel, where a bill for murder having been found against the prisoner at that Assizes, on application then made by the Crown to postpone the trial, the Chief

(a) Not reported.

Baron stated that, before granting the application, he would require an affidavit showing the grounds of postponement: the affidavit was accordingly made, and the Chief Baron granted the application, considering the grounds sufficient. I think these cases show that however general may have been the opinion of the Profession, and practice in Ireland, as to the existence of this privilege, it has not been of that uniform character which should prevent this Court from examining the grounds of such opinion, and deciding that such practice was erroneous. Upon examining the several cases in England, to which we have been referred, it will be found that in none of them was this supposed right claimed on the part of the Crown; but, on the contrary, that, in every case in which a trial for felony was postponed, on the application of the prosecutor, from the Assizes at which the bill was found, the application was made upon an affidavit stating the grounds, and appears to have been considered as one which it was in the discretion of the Court to grant or to refuse. In the case of *The King v. Crowe* (a), the trial was postponed at the instance of the prosecutor, on an affidavit stating the absence of a material witness. No claim of right was put forward, though an application was made by the prisoner for his costs, and was refused by Littledale, J., upon the ground that, in cases of felony, no costs were paid to a prisoner. In the cases of *The Queen v. Owen* (b), for murder, *The Queen v. Gutteridge* (c), for rape, then a capital felony, and *The Queen v. Bowen* (d) for murder, the trials were also postponed at the instance of the prosecutor, upon affidavits stating various grounds, but not upon the ground of this supposed right, though, in the last case, from its peculiar circumstances, the application was much discussed. Others of the cases which have been cited are to the same effect; particularly that of *The King v. Morgan* (e), in which this right of postponement by the prosecutor was not claimed or put forward, though, in that case, the postponement of the trial, which had previously taken place, was relied on as a default or delay by the prosecutor, which entitled the prisoner

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(a) 4 Car. & P. 251.

(b) 9 Car. & P. 83.

(c) 9 Car. & P. 228.

(d) 9 Car. & P. 509.

(e) 1 Buls. 84.

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to be admitted to bail on a charge for murder. And that case was decided at a period when there was certainly no disposition on the part of our Courts to abridge the rights of prosecutors, or extend those of the prisoner. There is another case, that of *The Queen v. Savage* (a), which was not cited in the argument, and which goes somewhat further. In that case, a bill having been found for felony, an application was made by the prosecutor, at the same Assizes, to postpone the trial, upon affidavit stating that a material witness was unable to attend; but Erskine, J., considered the affidavit insufficient, in not showing the materiality of the evidence which the witness was to give, and deferred granting the application until another affidavit should be made, to supply the deficiency. The present Mr. Justice Keatinge, who was the prosecuting Counsel, did not, in support of his application, rely upon the right now contended for, but procured the requisite affidavit; upon which, accordingly, the trial was postponed, and without which, it would appear that, the postponement would not have been granted. I do not see how these several cases, in all of which the application for a postponement was made upon affidavits stating the grounds, in one of which the sufficiency of the affidavit was denied, and in none of which this supposed privilege was claimed or relied on, are reconcilable with the existence in England of that privilege. They would, on the contrary, show that, in coming to a conclusion that such a privilege should not be conceded in Ireland, we shall adopt a rule and practice similar to that which prevails in England. It has, however, been argued that the course of proceeding in those several cases in England may be accounted for by the circumstance that the prosecutions, though carried on in the name of the Crown, were not actually conducted by the Crown represented either by the Attorney-General (as in this case), or by Counsel appointed by him (as in most of the prosecutions in Ireland), but were conducted by private prosecutors and their Counsel, who would not be entitled to the same privilege as the Attorney-General or Counsel appointed by him. But, in my opinion, this distinction does not affect the questions now before us. In the case of *The Queen v. M'Gowan* (b),

(a) 1 Car. & K. 75.

(b) Not reported.

decided last year by the Court of Criminal Appeal in Ireland, my Brother CHRISTIAN, before whom the case had been tried at the Sligo Assizes, reserved the question whether the right of ordering jurors to stand by in cases of misdemeanour, which unquestionably belongs to the Crown, when prosecuting by the Attorney-General or Counsel appointed by him, may also be exercised by a private prosecutor or his Counsel; and it was held by all the Judges of the Court of Criminal Appeal (with one exception) that, because the right existed in the former case, it also existed in the latter. I do not see why, upon a similar principle, a private prosecutor or his Counsel should not have the same privilege, with respect to the postponement of a trial, as would belong to the Attorney-General or his Counsel, in prosecutions actually conducted by them for the Crown; and it would therefore follow that the English cases, which negative the existence of such a right in private prosecutors or their Counsel, are authorities to show that it does not exist in prosecutions conducted by the Attorney-General or his Counsel. I am accordingly of opinion that the postponement of a trial for felony, from the Assizes at which the bill is found, is not a matter of right, or of course, on the application of the Attorney-General or other Counsel conducting the prosecution; but that it is matter for the discretion of the Court, which should be satisfied by affidavit or otherwise that there are sufficient grounds for the postponement.

I am also of opinion that, as in the case now before us, the postponement of the trial is not accounted for upon any ground that would show its propriety or expediency. There has been a default or delay upon the part of the Crown, on which the prisoners are entitled to rely in support of their application for bail; the principle of delay, on the part of the prosecutor, being a ground for admitting a prisoner to bail, appears to have been recognised so far back as the case of *The King v. Morgan* (a), already mentioned, though the charge was for murder, and a bill had been found accordingly. The trial was postponed on the part of the prosecutor; and there appears to have been no ground for the postponement, except, as suggested by the report, that the prosecutor did not like the

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The right of ordering jurors to stand by in cases of misdemeanour may be exercised by a private prosecutor equally with the Crown.—*Regina v. M'Gowan* (Ct. Crim. Ap., E. T. 1858).

(a) 1 Bulst. 84.

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appearance of the jurors who attended for the trial. The prisoner afterwards applied to the Court to be admitted to bail; the Court granted the application, and did so (as stated in their judgment) upon the ground of the delay. One of the Judges states, "If the "default of the trial had proceeded from a cause on the part of "Morgan the prisoner, peradventure there he would not be bail- "able; but here, in this case, the default proceeded from the part of "the prosecutor himself, and, therefore, in this case he may well be "bailed." This case is referred to by Lord Campbell, in *Barthelmy's case* (a), as having been decided on the ground of improper delay on the part of the prosecutor; and he does not dissent from the principle of the decisions. It is right, as a general rule (subject to some exceptions), that, where the default of the prosecutor has delayed the trial, it should not also prolong the period of the prisoner's imprisonment before trial, which would be the case if he was not admitted to bail. It has, however, been urged by the *Attorney-General* that, even if the question of postponement was discretionary with the Court, and not the right of the Crown, still that, as Mr. Baron Greene actually postponed the trial, such postponement should not be regarded as the default of the Crown, on which the prisoners can rely as a ground for being admitted to bail, but as having been granted by the learned Judge in the exercise of his discretion, with which we should not now interfere. There might be some force in this argument, if any reasons for the postponement had been stated to Mr. Baron Greene, and if he, in the exercise of his discretion, postponed the trial, considering those reasons sufficient, even though we were of opinion that we should ourselves have come to a different conclusion; but it appears that the application was made by the *Attorney-General*, and granted by the learned Judge, as a matter of right on the part of the Crown, without any ground being relied on to show that it was requisite or advisable. It has been further urged that, though the prisoner's Counsel opposed the application, yet that, in the discussion below, they admitted the existence of the right contended for. Even if this were so—if, under a mistaken impression of the law, and entertaining the opinion which generally

(a) 1 EL. & BL. 9.

prevailed in this country, the prisoners' Counsel did not deny the existence of this right in the Crown, but merely protested against its exercise; and if the Crown Counsel obtained the postponement by the assertion of a right to which in fact they were not entitled, I do not think that, upon the present application, the prisoners should be prejudiced by any such mistaken conception of their Counsel, or be the less entitled to rely upon the postponement as a default on the part of the Crown. It cannot be said that, in the present instance, the Crown Counsel, acting under the impression that this right existed, declined, on that account, to put forward grounds, which they otherwise might have done, showing the expediency and propriety of the postponement. If that was the case, and if satisfactory reasons for the postponement were now shown to the Court, then indeed the postponement might not be considered as a ground for admitting the prisoners to bail; but, neither in the affidavit filed on behalf of the Crown, nor in the argument of the *Attorney-General*, has any reason whatever been stated or suggested to justify the postponement, except the suggestion of the *Attorney-General* that, on account of the previous adjournment of the Kerry Assizes, there may not have been time enough for the convenient trial of this case at the Cork Assizes. A reference to the dates will show that the postponement cannot be justified upon this ground. Another party had been tried at the Kerry Assizes, upon a charge similar to that against the county Cork prisoners. The jury had disagreed; and, upon the application of the *Attorney-General*, the Kerry Assizes were then adjourned until the 30th of March. If that period did not leave a sufficient interval for the trial of the Cork prisoners, then a later day should have been named for the adjournment; but in fact there appears no ground for the suggestion that the time was not sufficient. The indictment against the Cork prisoners was found by the grand jury of that county, upon the 17th of March; and the affidavit of Sir Matthew Barrington, the Crown Solicitor, after stating these dates, and some other formal matters, merely adds, "that, under these circumstances, the trial was postponed;" without even suggesting that there was not sufficient time for the trial, or that the postponement was considered necessary or advis-

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able for any other reason. It is to be presumed that the *Attorney-General*, in applying for the postponement, had what he considered a sufficient reason for the exercise of his supposed right; but we cannot speculate on what passes through the minds of others; we can only consider what appears upon the facts and statements before the Court; and upon them we are left to conjecture merely, as to what were the real grounds of the application. It was strenuously opposed on the part of the prisoners; they had engaged special Counsel, *after* the adjournment of the Kerry Assizes, and had made other preparations, as to Counsel and witnesses, for their trial at the then Cork Assizes, and had thereby incurred expenses considerable for persons in their class of life, and which they might not be able again to defray. The principle of Lord Clommel's reasoning, in *The King v. Jackson (a)*, against the arbitrary postponement of a trial, because "the prisoner might be undone" by the death of his witnesses, would appear also applicable to the case of prisoners who may be disabled by poverty from again providing for their defence; and the hardships suffered by the prisoners, from the course of proceedings adopted in this case, shows the great inexpediency of the privilege contended for. That hardship would be rendered much more severe, by now prolonging their imprisonment, to await a trial, which should have taken place before, but which, without any apparent necessity or reason, has been delayed by the act of those representing the Crown.

The principles upon which this Court should act, in admitting prisoners to bail, are laid down in some of the cases cited in the argument; and, from the judgment of Coleridge, J., in one of them—*Barronet's case (b)*, and of Burton, J., in another—*The Queen v. Woods (c)*—the general rule (independent of the question of default or delay of the prosecutor in proceeding to trial) would appear to be, that this Court has an unlimited discretion to admit prisoners to bail before trial; that a prisoner is detained in custody, not because of his guilt, nor by way of punishment, but because there are such sufficiently probable grounds for the charge against

(a) 25 How. St. Tr. 794.

(b) 1 El. & Bl. 1.

(c) 9 Ir. Law Rep. 71.

him, as to make it proper that he should be tried, and because his detention may be necessary to insure his appearance at the trial; that the strength of the evidence of a prisoner's guilt is not conclusive against the propriety of admitting him to bail, though, of course, it is (with reference to the amount of punishment to which the prisoner, if convicted, would be liable) a material circumstance to be considered in determining the question whether, in the opinion of the Court, the prisoner, if admitted to bail, would probably appear to take his trial, or whether his detention be necessary to secure his appearance at the trial? and that, for the determination of that question, the important elements are, the nature of the charge against the prisoner, the evidence by which it is supported, and the punishment to which the prisoner, if convicted, would be liable. According to those principles, where the charge is for murder, or some other offence, for which the prisoner, if convicted, would probably suffer the punishment of death; then, if there be strong grounds for anticipating a conviction, it may well be contended that the prisoner should be detained in custody, because no amount of bail that he could give would afford reasonable assurance that he would be forthcoming at the trial, and would not sooner forfeit his bail than risk his life; but where, though the offence charged be a serious one, and the evidence strong, the punishment is only secondary, then the question, in my opinion, stands upon very different grounds. In the present instance, it is not necessary to discuss the sufficiency of the evidence in support of the charge, as the fact of the bill having been found shows that there is (within the rule stated by Coleridge, J.) sufficient foundation for the charge, "to render it proper that the prisoners should be tried." With respect to the offence charged, it is unquestionably of a highly criminal character, one of great enormity, and fully deserving the terms in which it has been characterised by the *Attorney-General*. But it is not a capital offence; the punishment for it has been reduced to transportation or penal servitude; and the application for bail is, therefore, not encountered by the difficulty which I have mentioned exists in those cases where the punishment is death. It

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E. T. 1859. has, however, been urged by the *Attorney-General* that, though
Queen's Bench the offence in this case has been reduced by the law from treason
THE QUEEN to treason-felony, it should be dealt with, for the purpose of the
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authorities and decisions in several cases are opposed to the principle of admitting to bail, against the will of the Crown, persons charged with treason; but the punishment for the offences charged in those cases was death; and the decisions in them are, therefore, to be considered with reference to that circumstance, as rendering it improbable that the prisoners, if bailed, would have appeared to take their trial; and the principle of this Court, admitting to bail prisoners charged with the offence now before us, is distinctly recognised by the Petty Sessions Act (14 & 15 Vic., c. 93, s. 17, *ad cal.*), which provides that no persons charged with that offence shall be admitted to bail, except by order of the Government, or of this Court, or a Judge thereof in Vacation. The prisoners here should not be detained in custody as a punishment for guilt which has not yet been proved; and according to the rule above mentioned, the enormity of their offence cannot be relied on as a ground for their detention, except so far as the severity of the punishment annexed to that offence affects the probability of their appearing to take their trial. It cannot be said that, because their punishment, if convicted, may be penal servitude for life, their application for bail should, therefore, be refused, on the ground that no amount of bail would be sufficient to insure their attendance at the trial. Such a proposition cannot be sustained. We find, in several cases, where the punishment to which the prisoners were liable for the offence charged was transportation, and there appeared fully sufficient grounds to sustain that charge, that the prisoners were, notwithstanding, admitted to bail. In *The Queen v. Woods* (a), the charge was for manslaughter, found by the verdict of a Coroner's jury against the prisoner, who was accordingly arrested, and was liable, in case of conviction, to the punishment of transportation; and yet, before the Assizes came on, or any bill of indictment could have been preferred against him, he was admitted

(a) 9 Ir. Law Rep. 71.

to bail by this Court; Burton, J., stating that, though he was satisfied there were sufficient grounds for the bill for manslaughter, yet that was no reason for not admitting the prisoner to bail, "on his giving bail in such an amount as, morally speaking, may prevent the danger of his not being forthcoming on the trial." In *The Queen v. Gallagher* (a), the first application made by the prisoners for admission to bail was refused by this Court, no Assizes having intervened since the prisoners were committed, the charge being for a widely extended conspiracy for the destruction of sheep, in which it was thought probable that the very persons offered as bail may have themselves participated; and it being alleged, that there was a public subscription in the county, to be applied for the purpose of indemnifying the bail. At the following Assizes a bill for sheep-stealing only was preferred and found against the prisoners; their trial was postponed by the Crown, without any apparent grounds; and, upon a second application to this Court, the prisoners were admitted to bail, though they were liable for that offence to the punishment of transportation.

Various other cases have occurred, in which the same principle of admitting to bail prisoners charged with transportable offences, whether before or after bill found, has been recognised and acted on by the Court. The *Attorney-General* has referred to some authorities in which bail has been refused. Before adopting the decisions in those cases, we should, however, examine how far the circumstances of them correspond with those facts in the present case, which are relied on in support of the prisoners' application; and it will be found that there is no instance among them of bail having been refused, where the punishment for the offence charged was not capital, and where the trial, as in this case, was postponed by the delay of the prosecutor, without sufficient reason. In the cases of *The Queen v. Chapman* (b) and *The Queen v. Bowen* (c), bills had been found for murder; and the observations of Lord Abinger, in the former case, which have been relied on by the *Attorney-General*, should be considered with reference to that circumstance. In the

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(a) 7 Ir. Com. Law Rep. 19; S. C., 8 Ir. Com. Law Rep. 93.

(b) 8 Car. & P. 558.

(c) 9 Car. & P. 509.

E. T. 1859. case of *The Queen v. Owen* (a), where bail was refused, the charge was also for murder; and in all these cases, though the trials had been postponed, it was done upon sufficient reason, such as the absence of material witnesses, &c., without any default on the part of the prosecutor. In *The Queen v. Gutteridge* (b), where bail was also refused, the charge was for rape (then a capital offence), and the application for postponing the trial from the Assizes at which the bill was found was grounded on an affidavit, stating that a material witness was kept out of the way by the prisoner himself who had been previously out upon bail. In *Barronet's* and *Barthelemy's* cases (c), bail was refused; but the charge was for murder; there had been no postponement or delay. In *The Queen v. Magennis* (d), bail was refused, though there had been a previous postponement of the trial; but the charge was for murder. In *The King v. Scully* (e), already mentioned, the offence found by the bill, though not murder, was a capital offence; and Bushe, C. J., considered there were sufficient grounds for him, in the exercise of his discretion, to postpone the trial. In *The Queen v. Scaife* (f), and *The Queen v. Robinson* (g), though the offences charged were not capital, there had been no postponement or delay on the part of the prosecutors. In none of those cases, therefore, did the two circumstances exist which are relied on in the present application; namely, that the punishment of the offence charged is not capital, and that by the delay of the Crown the trial has been postponed without sufficient, or indeed any apparent, reason to justify such postponement.

The next question is, whether the further detention of these prisoners in custody appears necessary or expedient for the purpose of securing their attendance at their trial? They offer to give substantial bail, the amount of which would be regulated by the Court; they positively swear that, if admitted to bail, they will attend for their trial at the next Assizes. And it appears that other parties,

(a) 9 Car. & P. 83.

(b) 9 Car. & P. 228.

(c) 1 El. & Bl. 1, 8.

(d) 5 Cox, C. C., 511.

(e) 1 Cr. & Dix, C. C., 168.

(f) 9 Dow., P. C., 553; S. C., 5 Jur. 700.

(g) 23 Law Jour., Q. B., 286.

charged as accomplices or participators with the prisoners in their offence, against whom similar bills had been found, at the Cork Assizes, and whose trial was then also postponed, had been previously admitted to bail, appeared at the last Assizes, in pursuance of their recognizances, and were again admitted to bail, with the concurrence of the Crown. Sir M. Barrington, the Crown Solicitor, on the other hand, does not state, in his affidavit, his belief or apprehension that these prisoners, if admitted to bail, will not attend for their trial; or that it is for any reason expedient or advisable that they should, in the meantime, be detained in custody. There is no suggestion in his affidavit to that effect, and there appears to me to be no just ground for apprehending that the ends of justice would be defeated by our admitting the prisoners to bail in such an amount as, to use the words of Burton, J., "may, morally speaking, prevent the danger of their not being forthcoming at the trial" (a).

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For these several reasons, I am of opinion that this application should be conceded; and that, by admitting the prisoners to bail, we should perform but an act of justice to them, without departing from those principles which have been established for the guidance of this Court in the administration of the law. The proceedings adopted in this case have already inflicted considerable hardships upon the prisoners, by their protracted imprisonment, the consequent interruption and injury to their pursuits in life, and the fruitless expenditure which they incurred in preparing for their trial. Their further detention in custody until their trial would be a serious aggravation of those hardships. It is from the act of the Crown, in delaying the trial, that the necessity for the present application has arisen; and, in my opinion, no sufficient reason has been shown why, by such a prolongation of their imprisonment, the prisoners should be visited with the consequences of that delay.

PERRIN, J.

In this case the prisoners were arrested in December, committed to gaol in January, and have ever since been detained in prison. Indictments were preferred and found against the prisoners at the

(a) 9 Ir. Law Rep. 72.

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Cork Assizes next following their committal, for treason-felony, a grave, dangerous and alarming offence, and one which calls for suppression and punishment. The prisoners state that they were there fully prepared for their trial, and anxious for it, and there is no allegation on the part of the Crown that the evidence was defective, or that there was not a sufficient attendance of jurors. The *Attorney-General*, however, stated that it was not his intention to proceed with the trial at that Assizes; and without argument—without discussion—on that *ipse dixit* of the *Attorney-General*, the trial was postponed. It has been contended that that was not the act of the *Attorney-General*, but of the Judge at the trial, in the exercise of his discretion. It appears, however, not that the excellent and learned Judge refused to hear any argument on the point, but that without argument and without discussion, the case was disposed of. In consequence of the importance of the present question, I shall begin with that which is the real point in the case, viz., what is the law upon this subject? And since I heard that great and good Judge Fox, between fifty and sixty years ago, say, on the North-East Circuit at Dundalk, that his duty was not to listen to speculative or fine opinions on the Habeas Corpus Act, but to discharge the gaol under his commission of gaol delivery, I have been of opinion that such is the object of that commission. The first authority to which I shall refer is *Lord Coke*, 4 *Inst.*, c. 30. In that chapter are contained observations upon the Justices' commission of gaol delivery, the commission of which our commission is, at the present time, a plain and accurate translation, unaffected by any of the changes in the law:—"By the law of the land, *ne homines diu deteneantur in prisona*; but that they might receive *plenam et celerem justitiam* this commission was instituted." That is the object of the commission, which in a few words authorises the Judges to deliver the gaols, not of this or that prisoner, but "*de prisonariis in ea existentibus*," of all prisoners and malefactors therein. There is no exception of any crime or any offender; the gaols are to be delivered of all offenders therein. After referring to the statute 1 *Edw. 6*, *Lord Coke* proceeds:—"Here, by the judgment of the whole Parliament, this conclusion doth follow, that Justices

“of gaol delivery, according to the generality of the words of the
 “commission, may deliver the gaol of prisoners committed for high
 “treason, which,” says *Lord Coke*, “we prefer before any private
 “opinion.” In the following chapter, where something like an
 opinion is suggested as to the charge to be given by the Judge, a
 passage occurs (*ad cal.*), of much importance in reference to the
 observations which have been made as to the enormity of the offence
 with which the prisoners are charged:—“There is nothing within this
 “realm that conserveth the subjects in more quietness, rest, peace
 “and good concord, than the due administration of the laws.” *Hale*,
 in various passages, confirms, if any authority can be said to confirm,
 what *Lord Coke* lays down. In *Hale, P. C.*, vol. 1, c. 34, p. 259,
 it is stated, “After the prisoner hath pleaded, and put himself on
 “the country, the next thing in order of proceeding is the trial of
 “the offender;” and in vol. 1, c. 41, p. 293, “After the arraign-
 “ment of the prisoners, and their plea of not guilty received and
 “recorded, the Sheriff returns the panel of the jury, the prisoners
 “are again called to the bar, and, the jury being called and appearing,
 “the prisoners are told by the clerk, if they will challenge any of
 “them, they are to do it before they are sworn.” When the prisoner
 comes to be tried he is called on to plead, and “by the plea of not
 “guilty the prisoner puts himself upon the trial by jury; and when
 “the record comes afterwards to be made up, the prosecutor on the
 “part of the Crown adds the *similiter*; but even before this formal
 “entry the *similiter* is supposed to be added by the prosecutor imme-
 “diately on the plea of not guilty being pleaded by the defendant,
 “which brings the parties to issue: and then they proceed, as
 “soon as conveniently may be, to the trial:” 4 *Steph. Com.*, 4th ed.,
 p. 472. I have looked not merely into the authorities, but also
 into the books of practice, to ascertain accurately the rules as to the
 conduct of the trial: and in 1 *Chit., C. L.*, p. 483, I find a distinc-
 tion taken between a prosecution for felony and other offences:—
 “When the defendant is indicted for felony, it is *always* the practice
 “to try him at the same Assizes.” In place of *always*, I would
 read *generally*; and again, at p. 492, “Before any application can
 “be made to postpone the trial, notice must be given to the oppo-

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 "K. B. a rule nisi must be obtained. Upon this an affidavit must be
 THE QUEEN "made, stating the names and places of abode of absent witnesses, and
 v. "that they are material to the prosecution or defence." The materiality of the witnesses is a matter applicable equally to the prosecution and defence. I find also the following passage in the *Eighth Report of the Commissioners on the Criminal Law*, c. 7, s. 2, art. 1:—"A trial may be postponed by reason of the illness or absence of a witness," and for a number of other reasons; for which they refer to the books of the reports, and, at the conclusion of the article they state, "and in other cases, where the Court is, under the particular circumstances, satisfied that such delay is proper and essential to the ends of justice." The only notice which I find taken in that report, or in the books of practice of the Attorney-General, is, that he may ask for a trial at Bar, and when the record is in the Queen's Bench he may insist upon it: *Eighth Rep. Com. Crim. Law*, c. 7, s. 1, art. 1, 2. I do not cite this *Report of the Commissioners on the Criminal Law* as an authority; but as showing what is the state of the law in England; and I shall not go through the bead-roll of cases which the Commissioners attach to each of their suggestions for the improvement of the law; but in c. 7, s. 2, art. 5, they say, "Where a trial for felony is postponed at the instance of the prosecutor, it is discretionary with the Court to order the prisoner to be detained to the next Assizes or Session, or to admit him to bail, or discharge him on his own recognizance." What I think is to be complained of in this case is, that this discretion was not exercised by the Court, but by the *Attorney-General*, on the part of the prosecution, without any reason being shown by affidavit for the postponement; and I have looked in vain for any authority for what I would call the "Irish notion" of this arbitrary proceeding—a notion which, I collect, is understood by those who profess to hold it on Circuit to be the right not merely of the Attorney-General, but also of every private prosecutor.

As far as my research has gone, I think the rule is clear, absolute and unqualified, that the trial ought to follow the indictment and arraignment as closely as can be without doing an injustice. That

rule is to be found in the words of the commission of gaol delivery, and in the observations of *Lord Coke* and *Lord Hale* on the same subject. What, then, is to annul, to limit or to qualify this ancient established institution, defined by our commission for our direction in the administration of justice? It is said the Habeas Corpus Act is to do so; but upon this point the case of *The King v. Jackson (a)*, which has been mentioned by both my learned Brothers who have preceded me, is very important. That Act is not referred to in the case; and, indeed, it is very difficult to suppose that that Act was intended to have any such operation as that which is contended for. Lord Clonmel's observations, in the case of *The King v. Jackson*, are not pointed to the Habeas Corpus Act. There the prisoner was indicted and arraigned in June 1794; and it is not of course that a person should be tried in the Queen's Bench on the same day on which he is arraigned; the prisoner pleaded not guilty, and the Attorney-General then moved that a day might be appointed for the trial. There was no default on the part of the prosecution, because the Attorney-General adds, "If the prisoner be not ready for his trial this Term, I have no objection to its being postponed until the next Term." Accordingly, in the following November, the prisoner was put forward for trial, and then applied for a further postponement; no objection was suggested on the part of the Crown, the Attorney-General saying that it was "his duty to yield to everything consistent with the administration of justice, not only that the prisoner may have justice administered to him, but that all mankind may see it is administered fairly. Then, in the next Term, the Attorney-General, Wolfe, afterwards Lord Kilwarden (and great consideration is to be paid to everything which fell from that eminent lawyer), said, "I am to move the Court to postpone the trial to some day within the Term, in such time as may give an opportunity to issue a *venire*; the ground of my application is this, that one of the witnesses is absent, and cannot attend this day." He then refers to the affidavit on which he moved; he does not assume to himself a right to postpone the trial; and yet he was a man who, having regard to a sound sense of the duties of his

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(a) 25 How. St. Tr. 783, 802.

E. T. 1859. office, was not likely to abandon any of the prerogatives either of
Queen's Bench the Crown or of his office. The Attorney-General stated the
 THE QUEEN grounds of his application, viz., the absence of two material wit-
 v. nesses, from an affidavit made by the Crown Solicitor; the motion
 M'CARTIE. was discussed; Curran, afterwards Master of the Rolls, and Pon-
 sonby, afterwards Lord Chancellor, contending, on behalf of the
 prisoner, that sufficient grounds for postponement were not disclosed
 by the affidavit; the Prime Serjeant Toler, afterwards Lord Nor-
 bury, replied on the part of the Crown; and Lord Clonmel, C. J., in
 delivering the judgment of the Court, said, "This rule is made with
 the concurrence of my Brethren," viz., Downes, J., afterwards Chief
 Justice, and Chamberlain, J., two of the greatest Judges who ever
 adorned this Bench; and they sitting by and concurring, the judg-
 ment of the Court is pronounced in the terms which my learned
 Brothers have alluded to. Now, when Lord Clonmel says, "It
 "never was of course, and it ought not to be of course, to postpone
 "a trial on the part of a prosecutor," we must consider his obser-
 vation as applied to the case then before the Court, viz., one in
 which the Attorney-General, on the part of the Crown, was the
 prosecutor; and, by the words "of course," we must understand
 that the trial cannot be postponed without sufficient cause being
 shown to the Court; because cases might occur in which the exist-
 ence of such a right would put it in the power of a prosecutor to
 worry a prisoner whom he could not convict, by postponing his trial,
 either because he saw a jury of reasonable men in the box, or for any
 capricious reason of his own, if such was the limit of his judgment.
 It is to be remarked that the Habeas Corpus Act (Ireland) was
 passed in 1782, only twelve years before the trial of the case of *The*
King v. Jackson; and yet Lord Clonmel states that he had held
 the same opinion for twenty years, that is, eight years before the
 Habeas Corpus Act was passed. I think it, therefore, impossible,
 by any ingenuity, to contend that this case of *The King v. Jack-*
son is not a solemn decision upon the rule which governs the post-
 ponement of criminal trials; a decision of this Court, pronounced by
 three of the ablest Judges who ever sat upon this Bench, in the
 presence of learned and able Counsel; and I cannot understand

why it is not to conclude the law upon this point in Ireland. It concurs with the practice in England, and is the same rule which, years ago, I heard laid down by Judge Fox—a man of deep learning and sound principle. In the case now before the Court, of the prisoners in Cork gaol, to which I am at present confining myself, the strong and able arguments of the *Attorney-General*, to show his sense of the danger of precipitating a trial, strike my mind as affording rather less excuse for the irregular course which has, in my mind, been pursued; because the greater and more enormous, as it is said, the crime is (how the fact may be, I do not know), the more necessary it was that the perpetrators of it should be brought speedily to justice. The prisoners ask to be admitted to bail—to be relieved from the imprisonment they are now undergoing, and which has been prolonged by the act of the prosecutor. One of the parties has been admitted to bail, and it appears to me that there is no reason why the other prisoners should not be also admitted to bail. I am also impressed, to some extent, with the quaint old case in *Bulst. (a)*, which was cited by Mr. *Sullivan*. I think, if the prisoners were ready for their trial, they are now suffering a hardship by being detained in prison—a hardship greater even than the unexpected postponement of their trial; and, adopting the view that they are now kept in prison, not by any default of their own, but by the act of the prosecutor, who, instead of proceeding with the trial, in the ordinary course, after the prisoners had been arraigned, apparently without reason, or for some reason not to be disclosed, postponed the trial, in my judgment the prisoners in the Cork gaol ought to be admitted to bail. The facts of the present case have been so fully stated by my Brethren who have preceded me, that I do not consider it necessary to go through them again. As to the case of the prisoners in gaol in Kerry, I concur in opinion with the rest of the Court; their trial was postponed upon their own application.

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LEFROY, C. J.

With a great deal of what I have heard from my Brother

(a) *Morgan's case* (1 *Bulst.* 84).

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M'CARTIE. FERRIN I am quite disposed to agree. He has said many things well, as well as pleasantly; but I apprehend that, both at the Bar and (if I may say it with reverence) on the Bench, we have been steering quite wide of the mark, in discussing so much at length, and making so important a part of the case, the question what is the law as to the postponement of a criminal trial: whether it can be postponed by the Attorney-General, or by an ordinary prosecutor, with or without the concurrence of the Court: That is the question upon which authorities have been cited; but I should say, for my own part, that there was no occasion for any authority upon that point, inasmuch as the postponement of a trial must of necessity be the act of the Court, and is so entered on the records of the Court. What we have heard, therefore, of a prerogative postponement of a trial by the Attorney-General, or other prosecutor, is quite beside the purpose; for, in every case where it takes place, the Court must have complied with the application; and the postponement then becomes the act of the Court, and is so entered on the record, when it is made up. I am not here to hold that there is anything contrary to law in what Lord Clonmel laid down in *Rex v. Jackson* (a), "that it never was of course, and that it ought not to be of course;" and to that I may add, I hope it never will be of course that, in virtue of a prerogative, and without the concurrence of the Court, the prosecutor on behalf of the Crown should be entitled to postpone a trial. That cannot be done except by the concurrence of the Court. It is a matter upon which a writ of error cannot be brought, because it is the exercise of a discretion with which the law entrusts the Judges, and which, it presumes, will be exercised with a due regard to the liberty and benefit of the subject, as well as to the welfare of the Commonwealth. In the present case the trial has been postponed by the act of the Court; and by the same act the prisoners have been ordered to remain in custody. The true question then is, have the prisoners a right, in point of law, to be admitted to bail, because their trial has been postponed? That is the real question for our consideration; not what is the law with respect to the postponement of the trial, but whe-

(a) 25 How. St. Tr. 783.

ther, when the trial was postponed, these prisoners, under the circumstances in which they then stood at the Assizes, were entitled to have said to the learned Judge, "It is our right now, *ex debito justitiæ*, to be admitted to bail." The affirmative of that proposition, I must take leave to say, is not the law of the land. Although the trial was postponed by the learned Judge, the prisoners had no right, under the circumstances in which they then stood before that Court, to insist, as against the Crown, on being admitted to bail. We must recollect that Lord Clonmel's observations, in the case which has been adverted to, had reference to the postponement of the trial; and it is evident, therefore, that they are not any authority upon the question which was not before him, but which is now before us, viz., the right of the prisoners to be admitted to bail when the Court has postponed the trial. Two of my Brethren are disposed to make a different rule as to the two classes of prisoners; but I confess that I am unable to see any such substantial difference between the case of the Cork prisoners and that of the Kerry prisoners, as to warrant us in making a different rule in the two cases. I cannot understand why the prisoners in Kerry are to be detained in custody, and the prisoners in Cork to be admitted to bail. All the prisoners are under one and the same charge. Looking at the nature of the informations, as we are bound to do, but the particulars of which I purposely avoid entering into on this occasion, we know thus much, that the witnesses in both cases are the same. Looking at the bills of indictment found in the two cases, we see that they are precisely the same. Looking at the overt acts charged in the two cases, we find them precisely the same. Looking at the circumstances of corroboration, we find that they are of the same kind. Supposing them to be established—for I am only putting the matter hypothetically—well then, with such similarity in cases where the crime charged is a great conspiracy for a treasonable purpose, in which all are charged to be bound together by the same oath, stated in both the indictments, if we come to the conclusion that the prisoners in Kerry ought to be kept in gaol, do we not stultify ourselves if we suffer the prisoners in Cork to go at large? There is a danger also which has not been adverted to; for

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were I at liberty, or did I think that I ought, to go into the details of the informations, circumstances might appear which would make it peculiarly dangerous to the administration of justice, as affording an opportunity likely to be made use of for putting evidence out of the way, if these prisoners were allowed to go at large.* Upon the whole, therefore, I am of opinion that, if I am right in the one case, in holding that the prisoners ought not to be admitted to bail, I ought not, in the other case, to come to a different conclusion. But the question still remains, and it is made the great question in the case, whether, in consequence of the postponement of the trials, it was the right of the prisoners to be admitted to bail? That, as I have said before, depends altogether upon the circumstances in which they then stood, and the law as applicable to those circumstances. I must refer precisely to those circumstances, because they are the very hinge of this case. The prisoners were arrested in December last, upon a charge of treason-felony. They were brought up at the very first Assizes after their commitment, and bills of indictment for treason-felony were preferred and found against them at the respective Assizes of Kerry and Cork. The Crown declined to proceed to trial with the indictment in the Cork case; but, in the Kerry case, one prisoner was tried; and the Crown then declined to proceed with the trial of the remaining prisoners at those Assizes. The question in either case is the same. Had the prisoners then, or have they now, a right to insist on being admitted to bail, on account of the postponement of their trial? If they have such right, it must be either at the Common Law or by statute; and I am prepared to show, by a continuous and uniform course of practice, following out the Common Law and Statute Law, that there is no such right. That is the question for our consideration; and we are not to be diverted or turned aside from it by the question which has been raised, as to the postponement of the trial, which, however, I will presently advert to more particularly, in reference to some cases which have been cited on that topic. But I will first consider the

* NOTE.—This is understood to refer to a letter of one of the prisoners, containing such a suggestion.—[R&P.]

question whether, as these prisoners stood at the Assizes, they had a right to insist on being admitted to bail, in consequence of the postponement of their trial? The general course of practice has been that, where the Crown has preferred a bill of indictment, at the first Assizes or Sessions after the commitment of a prisoner on a charge of felony or treason, and it has been deemed advisable on the part of the Crown to postpone the trial to the next Assizes or Sessions of Oyer and Terminer, the order to postpone the trial has been accompanied by the order for the prisoners remaining in custody. During the progress of the argument, I pressed for a case, either in England or Ireland, in which a prisoner had been *de facto* admitted to bail, on the ground merely of the postponement of his trial—circumstanced as this was, as to diligence on the part of the Crown;—no case, however, could be produced; observe, I say, on the ground merely of the postponement of his trial. I speak not of any circumstance which might call into action the discretionary power of the Court; for, although some of my Brethren seem to entertain a doubt on the subject, I must say, for myself, that I do not recollect an instance in which there was a departure from the practice as I have stated it. I thought it desirable also to confer with that most able and experienced of our Judges, my Brother PENNEFATHER, who was for twenty years Crown prosecutor on the Munster Circuit, and filled the Bench for nearly double that period, and he has informed me that, in the course of his long experience, he never recollected an instance in which there was a departure from this habitual rule, in a case like the present. He added, that he never recollected but one instance of a question being raised as to that course of practice; and in that case it was, on argument, decided that the prisoner had no right to be discharged, merely on account of the postponement of his trial. My Brother CRAMPTON's experience is not so long; but, so far as it extends, he does not recollect anything at variance with the practice which I have mentioned. Well, then, here is a course of practice which will not, it is true, make law in criminal cases, even though it may have remained unimpeached for many years. That was so decided by the House of Lords (a), after argument;

(a) *Gray v. The Queen* (6 Ir. Law Rep. 482).

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but a practice which, nevertheless, I have adverted to, for the purpose of introducing the basis upon which it proceeded; and that is the law—the plain, clear law of the land—the Habeas Corpus Act (21 & 22 G. 3, c. 11), which, by its 6th section, provides in express terms both for the duty of our Courts of Oyer and Terminer, and of General Gaol Delivery, and also for the rights of prisoners, when they are to be indicted, and when to be tried, and for the consequences of their not being indicted at one particular period, or not tried at another. By the 6th section it is thus enacted:—"If one committed for treason or felony, specially expressed, shall, in the first week of Term, or first day of the Sessions of Oyer and Terminer or General Gaol Delivery, pray to be brought to trial, and shall not be indicted until some time in the next Term, or Sessions of Oyer and Terminer or General Gaol Delivery, after such commitment, it shall and may be lawful, to and for the Judges of the Court of Queen's Bench, and Justices of Oyer and Terminer or General Gaol Delivery, and they are hereby required, upon motion made to them in open Court, the last day of the Term or Sessions, to set at liberty the prisoner on bail, unless it appears, upon oath made, that the witnesses for the King could not be produced the same Term, Sessions or General Gaol Delivery; and if he shall not be indicted and tried the second Term or Sessions of Oyer and Terminer or General Gaol Delivery, he shall be entitled to be discharged altogether." What is the meaning of these terms of the statute? Is not a right given to the prisoner to be admitted to bail, if not *indicted* at the first Assizes, and a right to be absolutely discharged, if not tried at the second Assizes? But what are we to say then to the present case, in which the prisoners have been indicted at the first Assizes after their commitment? The Legislature has assumed that, if the prisoner be indicted at the first Assizes, he will be tried at the second; and, accordingly, the course of practice has followed the law, which, I may say, correlatively provided that, if the prisoner were not indicted at the first Assizes after his commitment, he shall be let out on bail; but *vice versa*, if he be indicted at the first Assizes, he shall not be let out on bail, although not then tried, because he is

then to be brought to trial at the next Assizes. The Legislature says, if "*he shall not be indicted and tried the second Term or Assizes,*" &c.; it does not say *before* the second Term. The law is clear and explicit that, upon failure of indictment in the first Term after commitment, the prisoner is entitled to be bailed; upon failure, both of indictment in the first and trial in the second Term, he is entitled to an absolute discharge; but on no other terms, so far as the case depends upon the provisions of this Act. And, accordingly, in Ireland the ruling of my predecessor in this seat, Chief Justice Bushe, in *Rex v. Scully (a)*, went expressly upon this distinction, a distinction taken in the very words of the Act of Parliament.

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Now what is Lord Holt's construction of this Act? We shall find he has not departed one jot from the construction put upon it in Ireland. Speaking of the Habeas Corpus Act in England, of which ours is a transcript, Lord Holt says, in the case of *Rex v. Gage (b)*, "Before that Act there was a rule at Common Law, that persons in prison must, in a convenient time, be bailed." I agree with my Brother PERRIN, who, in commenting on the word "convenient," has justly said that it must mean convenient to both parties, the Crown and the other person. Then, Lord Holt continues, "That though there was no time expressly limited by the statute of *Car. 1* for these prosecutions, yet it is apprehended "that now, by the Habeas Corpus Act of the 31 *Car. 2*, there is a "full obligation upon the discretion of the Court to admit prisoners "to bail;" and, after reciting the words of the Habeas Corpus Act, he says, "This is a proper measure for the Court to go by. What "the Parliament have thought a reasonable time ought to govern "the discretion of the Court." He says no time was expressly limited, before the Habeas Corpus Act; but he also says, that "by "that Act, if there was no prosecution in that time" (that is, if no indictment be preferred against him in the first Term), "he shall "be bailed the first Term, without an affidavit of the King's witnesses then being out of the way; and if not tried in the second Term, he should be discharged." That is Lord Holt's reading

(a) 1 Cr. & Dix., C. C. 168.

(b) 3 Vin. Ab. 518.

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and acting upon the statute. Now as to what is a reasonable time before the statute, *Morgan's case* (a) shows what might be considered as delay; but Lord Holt says, since the statute, "What the Parliament have thought a reasonable time ought to govern the discretion of the Court." Anything, therefore, which may have been done antecedently to the statute, as to admitting to bail, has no bearing at all upon the question. That, however, is not a solitary case. In *Bez v. Crosby* (b), the Attorney-General, in one Term, preferred an indictment for foreign treason, laying the overt acts in Ireland, and, in the following Term, he preferred an additional indictment for a treason in England. He did not proceed to trial, but resisted a motion on the part of the prisoner to be bailed under the statute, on the ground of the second indictment being preferred in the same Term in which the prisoner's application was made; but Lord Holt said, "The prisoner ought to be tried for the treason for which he is committed, within two Terms; the design of the Act was to prevent a man's lying under an accusation for treason, &c., above two Terms;" and accordingly the Court admitted the prisoner to bail. In that case the law was carried out in favour of the prisoner; but at the same time, Lord Holt shows that the construction upon which he acted in both cases was identical, viz., that the design of the Act was to prevent a man from lying under accusation for more than two Terms. So it was upon this construction of the Act that Chief Justice Bushe acted in *Rez v. Scully* (c). His words are, "The prisoner has no right, at the first Assizes after being made amenable, to call for a discharge, upon bail or otherwise, unless two circumstances concurred, viz, firstly, that he should remain indicted at the Assizes; and secondly, that he should, on the first day of the Assizes, have applied in open Court by prayer or petition to be brought to trial. If both these circumstances concurred, the prisoner, under the Habeas Corpus Act, s. 6, would be entitled to a discharge on bail, unless it should appear to the Court, upon oath, that the witnesses for the King could not be produced at these Assizes. But the Court

(a) 1 Bulst. 84.

(b) 12 Mod. 66.

(c) 1 Cr. & D., C. C., 168.

"here acts on its own discretion, which the mere perusal of the
"informations is sufficient to satisfy, even if no affidavit had been
"made." An affidavit had been made in that case, that future
evidence was expected; but the Chief Justice says that, it being
the first Assizes after his commitment, the prisoner had no right
to be admitted to bail; and that even if no affidavit had been made,
yet he would look into the informations to see whether the Court,
in the exercise of its own discretion, would bail the prisoner. He,
therefore, lays down two things; firstly, that the prisoner had not
then a right to be admitted to bail; and secondly, that there was
a discretion in the Judge to grant that which the prisoner was
not entitled to demand, either *de jure* or by statute, which I
admit. Now the only remaining case which has been referred to
on this point is that of *Rex v. Jackson (a)*. The question in that
case was, as to the postponement of the trial in the third Term after
the commitment of the prisoner. The question of bail did not
arise in that case, nor was it suggested; and Lord Clonmel says
(and his able and learned Brethren concurred with him), as to
the postponement of the trial, that, "it is not to be considered
"as a matter of course, but the rule must be governed by circum-
"stances." I do not question the propriety of that *dictum*; but
if it is cited as a *dictum* to establish the right of the prisoner to be
admitted to bail in the same Term in which he is indicted, that being
the first Term after his commitment, I must take leave to say,
that it is no authority whatever for such a proposition. It would
be doing an injustice to Lord Clonmel to give such an interpretation
to his words, which were spoken in reference to a state of facts
totally different from those of the present case. The question there
was, shall the trial be postponed? The question here is, the trial
having been postponed, have the prisoners a right thereby to be
admitted to bail, although they have been indicted at the first
Assizes after commitment? I hope, therefore, it will not be sup-
posed that we are adjudicating upon any other question than the
right of the prisoner to be bailed in the first Term after his com-
mitment, the Crown having prepared an indictment against him,

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(a) 25 How. St. Trials, 783.

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... the Court having its discretion committed to the justice of the Court. That is the question—not the defence, but the justice of the Court. What would be the result if the Court refused to postpone the trial? As to the question of whether the Court should give evidence to the jury, we must remember that it is the duty of the Court to ensure a criminal proceeding, and not a civil proceeding. The Judge cannot ...

... the *Attorney-General*, on behalf of the Crown, applied for a postponement of the trial, stating that it would be conducive to the ends of justice, but that it would interfere with the administration of the law publicly to state the grounds for postponement. Would the Judge say, "I will not postpone the trial unless you tell me publicly what your reasons are, and, therefore, I will direct the prisoner to be arraigned: and there being no evidence against him direct the jury to acquit him, and thus enable him to plead *autrefois acquit* to any future prosecution for the same offence?" No: the same law which entrusts the Judge with a discretion, from which here a *recurso* will not presume any abuse of it, and no hardship can result for the application to this Court is still open as to the admission to bail, and that alone is the question now properly before me. This Court is now to exercise its own judgment: the prisoners are in custody, and an application is made to us to admit them to bail. I have already adverted to the similarity between the cases of the prisoners in Cork and Kerry; but as the Members of the Court are not unanimous in their judgments upon both the cases, it is my duty now to consider the principles upon which this Court acts in the exercise of its discretion in admitting prisoners to bail. They are—first, the nature of the crime charged; secondly, the nature of the evidence against the prisoner; and thirdly, the punishment or other circumstance which may, more or less, be an inducement to the party not to appear and take his trial. First, then, as to the enormity of the offence; the charge is in form for *transmission*, but no one can doubt that the overt acts alleged are amply sufficient for the foundation of an indictment for high

treason; not merely a foundation for the artificial charge of compassing and imagining the death of the Queen, but overt acts, indicating a purpose of treason of every other description, by inviting foreign forces to invade the realm, drilling and preparing arms, and other acts which I will not go into unnecessarily; and these are the overt acts of parties bound together by an unlawful oath, which is set out in both indictments. It is said, indeed, that no particular injury is sustained by any individual, as in the case of murder. Yes, but those who are old enough to remember what rebellion is, and what its fruits, would have but little doubt that it would not be confined to one or two cases of murder. Then a position, which has been suggested in support of this application, is, that in no case of non-capital punishment can we withhold bail; but the very first case cited on the part of the prisoner puts an end to that visionary argument, *Regina v. Scaife* (a). In that case, which was not capital, although the wife was admitted to bail, yet bail was refused for the husband. So the case of *Rex v. Marks* (b) shows that one of the grounds for refusing the motion was, that the felony was mischievous to the State. What would that Court have said of the felony exhibited in this case, as to its mischief to the State? I confess it would appear to me, upon that and the other authorities, that I should be losing sight of my duty if I were to concur in the application to admit to bail any of these persons now before the Court. As to the question of postponing the trial, I omitted to notice, whist I was upon that point, a case which my Brother HAYES has adverted to, a very important case, *Regina v. Wyndham* (c), in which Chief Justice Parker, a very eminent Judge, the successor of Lord Holt, expressed his views as to the discretion of the Court acting on the credit which it feels it ought to give to the statement of the Attorney-General or Crown Prosecutor. He said (after referring to the length of time which had elapsed without an application to the Court)—“That he would have taken Mr. Attorney-General’s word if he had said at the Bar that he would “have indicted Sir W. Wyndham; but there not being any such

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(a) 9 Dowl., P. C., 553; S. C., 5 Jur. 700.

(b) East, 157.

(c) 1 Str. 3; S. C., 3 Vin. Abr. 515, 533.

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M'CARTIE. "undertaking given, the Court admitted the prisoner to bail." And in *Regina v. Owen (a)*, one of the witnesses being a person convicted of bigamy, and then incompetent as a witness, an application was made to the Court, on the part of the prosecution, to postpone the trial till the next Assizes, in order to allow of a pardon being sought for to render the witness competent; and the trial was accordingly postponed, and the prisoners remained in custody.

Upon the whole, as to the cases before us, our decision will be, as to the case of the prisoners in gaol at Cork, "no rule," the Court being equally divided in opinion; and as to the case of the Kerry prisoners, we are all of opinion that the motion should be refused.

(a) 9 Car. & P. 83, 86.

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In the Matter of ELIZA DILLON.

Where a publican applies to Magistrates, sitting at Petty Sessions, for a renewal of his license, under 17 & 18 Vic., c. 89, and 18 & 19 Vic., c. 62, which application is refused, upon the ground that the applicant's house had not been properly conducted during the previous year, this is not a case in which the Superior Court will direct the Magistrates to state a case under the 20 & 21 Vic., c. 43, s. 5; it being neither "an information or complaint" within the meaning of that statute, but a matter of fact to be ascertained by the Justices; the applicant's course, if aggrieved, is to appeal from the decision of the Magistrates to the Quarter Sessions, or (if in Dublin) to the Recorder.

APPLICATION for a conditional order, under the 20 & 21 Vic., c. 43, s. 5, directing the Divisional Justices of the College-street District of the Dublin Metropolitan District to state a case for the opinion of one of the Superior Courts of Law, pursuant to the provisions of that statute. It appeared from the affidavit of Eliza Dillon, upon which the application was grounded, that she was the proprietor of a licensed public-house, with a field attached thereto, in Donnybrook. That said house and field formed part of the fair-green of Donnybrook, upon which, under a patent granted by King John, a fair had been held annually until 1855, in which year the rights under the patent were bought up and the fair suppressed. That the said field, save for the erection of tents for the sale of

Per HAYES, J.—The term "information" means the initiatory step in proceedings of a criminal nature, which are to be disposed of summarily; the term "complaint" designates the initiatory step in summary proceedings of a civil nature.

drink, was never used as part of the licensed premises, although in 1856 it was entered as part of the premises on which deponent would carry on her business. That an application having been made, about the 10th of October 1859, to the Divisional Justices of the district of Donnybrook, for a certificate of the good character of deponent, and of the peaceable and orderly manner in which her house had been conducted during the past year, the same was opposed on behalf of the Secretary for Ireland and the Police Commissioners generally. That, it being required by the Act in question that the complaint should be made by some particular person, who should be the respondent in future proceedings, one of the superintendents of the Metropolitan Police was nominated, and his name duly recorded as being the person opposing the said certificate being granted. That the case having been heard before the said Divisional Justices on the 8th November inst., they gave judgment refusing the certificate, on the ground that the said licensed premises had not been conducted in a peaceable and orderly manner during the past year. That deponent, having been advised that the judgment of the Justices was erroneous in point of law, and that important and intricate questions of law were raised on her behalf upon the construction of several of the Excise and Spirit Acts, required the Justices to state a special case for the opinion of the Court of Common Pleas, which they declined to do, assigning as reasons, that the course open to the deponent was to appeal to the Recorder, and that it was not a case within the meaning of the statute in question.

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W. J. Sidney (with him *J. A. Curran*), for the application.

Serious questions of law were raised before the Magistrates, upon the construction of the statutes 17 & 18 *Vic.*, c. 89, and 18 & 19 *Vic.*, c. 62. The Court is, therefore, asked to grant the conditional order requiring the Magistrates to state the propositions of law upon which their decision was based, in order that those propositions may be discussed before one of the Superior Courts. From the title and preamble of the 20 & 21 *Vic.*, c. 43, it is clear that such a case as the present was contemplated by the statute.—[HAYES, J. Is this a summary proceeding under section 2?—LEFROY, C. J. The

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words of that section are, "any information or complaint;" can you say this is an "information or complaint?"—Yes, there are two parties contending here, the applicant for the certificate, and the party opposing the granting of such certificate, so that there is a matter in controversy between the parties. By the 18 & 19 Vic. c. 62, s. 1, the Magistrates are required to enter their order refusing to grant the certificate in a book, with the grounds of their refusal, in order to enable the party considering himself aggrieved to appeal. The stating of a case for the opinion of one of the Superior Courts of Law is substituted for the appeal given by the Excise Acts to the Quarter Sessions or Recorder's Court; and all that is sought by this motion is to be enabled to adopt that substituted remedy.

C. R. Barry, contra.

This was not an "information or complaint" in a summary proceeding; not merely an application to the Justices for a certificate of good conduct in the management of the applicant's house for the past year, which the Magistrates have refused to grant. The applicant ought to have appealed to the Recorder, and not have come to this Court. The 20 & 21 Vic., c. 43, is, therefore, inapplicable to this case.

Cur. ad. vult.

LEFROY, C. J.

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This Act of Parliament, which we are now called upon to construe, in the preamble expresses that it was passed for the purpose of enabling parties "to obtain the opinion of a Superior Court on "questions of law which arise in the exercise of summary jurisdiction by Justices of the Peace." That purpose the Act, in matters of contention between two parties in a summary proceeding, proceeds (a) to carry out, by virtually substituting, for an appeal to the Quarter Sessions, the course of taking the opinion of the Court. But the cases contemplated by the Legislature are only cases of "information or complaint." In these cases, the Act directs that

(a) Section 2.

the Magistrate may be called upon, when he exercises a summary jurisdiction, by either of the parties who may be dissatisfied with his decision in point of law, to state a case for the opinion of one of the Superior Courts of Law. This is not a case of "information or complaint," but an application under the provisions of Acts of Parliament, whereby a wholesome control is placed upon the granting of spirit licenses; and the tendency of legislation on this subject has been to render more and more stringent this control over the granting of spirit licenses. By one of the Acts (a), a party shall not be entitled to a renewal of his license, unless he produce to the officer of Excise a certificate, signed by the local Magistrates, of the good conduct of the party, and of his house having been properly conducted during the previous year. This is simply an application for a certificate upon a matter of fact. The party wanting the certificate applies to the local Magistrates for it, just in the same way as a servant would go to his master for a character. But this is not a matter which may involve a conviction; nor is it an "information or complaint." It is, as I have said, merely requiring that the party applying for the renewal of his license shall obtain a certificate as to a matter of fact, viz., the manner in which his house has been conducted during the previous year. The Legislature certainly did not contemplate that any serious question of law would arise upon such a case as the present; although I have no doubt that, were we to assume jurisdiction in such a case, the ingenuity of learned Counsel would not fail to suggest questions of law. Without, however, discussing the inconvenience of such a course, or the improbability of the Legislature having in their contemplation such a case as this, it is enough to say that the Act of Parliament specifies distinctly the two only cases in which jurisdiction is conferred upon the Superior Courts; and that is, in the case of "information or complaint." This is no complaint. The applicant can go to the local Magistrates, and say, "I desire from you a certificate to the effect that I have properly conducted my house during the previous twelve months." But this is only a matter of fact to be inquired into, not one of "information or complaint." I see no reason,

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(a) 17 & 18 Vic., c. 89.

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therefore, for putting such a construction upon this Act as we are asked to do by the appellant's Counsel; the more so, as the Court of Quarter Sessions, and the Recorder's Court of the city of Dublin, exercise a very salutary control over the decisions of the Magistrates on this subject, and are tribunals much better calculated than this Court could possibly be to carry out the object of these Acts (a), which is, to see that proper persons are entrusted with these spirit licenses. It is too a matter of importance to the public that these licenses be found in proper hands, and that the granting of them be not dependent upon questions of law raised by the parties. We cannot extend our jurisdiction beyond the plain terms of the Act, which are of definite import, and confined to cases of "information or complaint." This application, therefore, must be refused.

O'BRIEN, J.

I am also of opinion that this application should be refused, on the ground that the provisions of the statute 20 & 21 Vic., c. 43, enabling Justices to state a case for the opinion of a Superior Court do not apply to the case of an order made by them under the Spirit License Acts, refusing to grant to a party the certificate required by those Acts for a renewal of a license for selling spirits. One of those Acts (the 17 & 18 Vic., c. 89, s. 11) provides that no person shall get a renewal of such license without producing a certificate, signed by two of the Justices presiding at the district Petty Sessions, or by the Divisional Justice of the district (if in Dublin), of the good character of such person, and of the peaceable and orderly manner in which the licensed house had been conducted for the last year. The subsequent Act (18 & 19 Vic., c. 62, s. 1) provides that, where such certificate is refused, the Justices shall make an order accordingly, and cause an entry thereof to be made by the clerk, with the grounds of refusal; and section 2 gives the party refused a right of appeal to the Quarter Sessions, or (if in Dublin) to the Recorder. The statute 20 & 21 Vic., c. 43 (on which the present application is grounded), recites, in the preamble, the expediency of making provisions for obtaining the opinion of a Superior Court "on ques-

(a) 17 & 18 Vic., c. 89; 18 & 19 Vic., c. 62.

"tions of law, which arise in the exercise of summary jurisdiction
"by the Justices;" and enacts (section 2) that, after the "hearing
and determination" by a Justice or Justices, "of any information or
"complaint which he or they have power to determine in a sum-
"mary way," either party, if dissatisfied with the determination in
point of law, may apply to have a case stated for the opinion of a
Superior Court; and section 5 provides that, if the Justices refuse
to state such case, the party may apply to this Court for an order
requiring them to do so. I do not think that the application of
a person for such certificate of good character, in order to get a
renewal of his license, can be considered as "an information or
complaint," within the terms of that 2nd section; or, that the
inquiry of the Justices into the matter of such applications, or their
refusal to grant the certificate, can be considered as the "hearing
and determination of an information or complaint," as provided for
by that section. The Justices' certificate of good character was
substituted, by the late Spirit License Acts, for the certificate
required by former Acts to be signed by several householders, and
is a certificate as to a matter of fact to be inquired into by the
Justices. The provisions of the 18 & 19 Vic., c. 62, requiring that
the order of refusal, with the grounds of it, should be entered in the
book, were materials for the purpose, amongst others, of regulating
the subsequent proceedings on appeal; but it does not follow from
them that the order of refusal should be considered as a "determi-
nation made by the Justices in the exercise of their summary
jurisdiction upon an information or complaint," and as, there-
fore, coming within the cases provided for by the 20 & 21 Vic.,
c. 43. At the time of the passing of that statute, the Spirit License
Acts, regulating the application for the certificate, and the proceed-
ings thereon, were in force; and the omission from that statute of
terms which, in their ordinary construction, would include those
proceedings, would show that the provisions of that statute were not
intended to apply to such cases. If, in the present instance, the
Justices were wrong in refusing the certificate, the applicant is not
without remedy. She has the power of appealing to the Recorder

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M. T. 1859. against the order of refusal ; and this, in my opinion, is the only
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HAYES, J.

If this be a *casus omissus* in the Act of Parliament, society has great reason to be thankful for it. I think the case is not within the words of the 2nd section of the 20 & 21 Vic., c. 43. That clause speaks of the determination of an "information or complaint" in a summary way. The term "information" is of well-defined meaning ; and, whether it be in writing or *ore tenus*, is understood to be the initiatory step in proceedings of a criminal nature, which are to be disposed of summarily, while I apprehend the term "complaint" designates the initiatory step in summary proceedings of a civil nature ; but equally in both cases there is contemplated the existence of a matter in controversy between two parties. This, I think, is apparent from the 5th section of the Act, which authorises the appellant to apply to this Court for a rule, calling on the Justice, and also on the respondent, to show cause why a case should not be stated. The term "respondent" there plainly refers to the person who had appeared on the opposite side in the Court below. This, however, is a one-sided application made as to a simple matter of fact, viz., her character, and the manner in which she has conducted her house. I think the Legislature did not contemplate the raising of questions of law on such a matter ; but seems to have thought that enough was done when an appeal was given from the order of refusal by the Magistrates. I would call attention to the point set forth in the affidavit, and which was to form the subject of argument on the case, viz., whether the Magistrates, who were called on to give a character as to the conduct of the applicant's house, were justified in referring to, and having their opinions affected by, the irregularities committed and permitted by the applicant, in her field at the rear of her house, and into which whiskey was carried out of her house for the entertainment of persons assembled in tents that were erected there. It appears to me that no injury will be done to the public by our refusing to assist the applicant in bringing this notable point to a solemn determination ; and I cannot but think

she would have been better advised if she had applied herself rather to the improvement of the conduct of her establishment, including both house and field. I concur with the rest of the Court, that this application should be refused.

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Motion refused.

MURRAY v. COYMN.*†

Nov. 18, 22.

ACTION by the public officer of a Bank, for money lent and money paid. The plaintiff was described in the title of the plaint as Robert Murray, of No. 61 William-street, in the county of the city of Dublin, Esq., one of the public officers of the society or copartnership called the Provincial Bank of Ireland; and the plaint, after the usual statutory introduction, was as follows:—The defendant is summoned to answer the complaint of Robert Murray, one of the public officers of the society or copartnership called the Provincial Bank of Ireland, being a society or copartnership in Ireland consisting of more than six persons, carrying on the trade or business of bankers in Ireland, pursuant to the statutes in such cases made and provided, appointed such public officer pursuant to said statutes, and who, as such public officer, sues in this behalf as

A summons and plaint, by one of the public officers of the Provincial Bank, who, "as such public officer," sued therein as nominal plaintiff on behalf of the said banking copartnership, complained that the defendant was "indebted to the said copartnership" for "money lent by the plaintiff to the defendant," and for

"money paid by the plaintiff for the defendant, at his request;" and the plaintiff prayed judgment "as such public officer."—Held, bad on demurrer, for alleging the money to have been lent and paid by the plaintiff in his individual capacity, and not by or on behalf of the banking copartnership.

Keily v. Whittaker (1 Ir. Law Rep. 28) distinguished, on the grounds stated by Brady, C. B., in *Thompson v. Kelly* (6 Ir. Law Rep. 38), as having been decided after verdict.

The 6 G. 4, c. 42, is to be strictly construed; and in civil proceedings, the cause of action must, according to the fact, be averred to have accrued to the banking copartnership; although in criminal proceedings, the property may be laid in, or the offence averred to have been committed against, any one of the public officers.

* LEFROY, C. J., *absente*.

† Note.—The publication of this case has been unavoidably postponed.

nominal plaintiff for and on behalf of the said society or copartnership, and who complains that the said defendant is indebted to the said society or copartnership in the sum of £320. 13s. 3d. sterling, besides interest, as hereon indorsed, money lent by the plaintiff to the defendant, and money paid by the plaintiff for the defendant, at his request, the particulars of which are indorsed hereon; and the plaintiff, as such public officer, prays judgment to recover the said sum of £320. 13s. 3d., and interest, as hereon indorsed, and his costs of suit. Therefore, the defendant is hereby required to appear &c.

INDORSEMENT OF PARTICULARS:

Dr.				Cr.
1856, Dec. 4—To cash—No. 654	£5		1856, Dec. 1—Lodgment	£400,
&c.	&c.		&c.	&c.
	Balance due	£320. 13s. 3d.		

Demurrer to the plaint.†

Beytagh (with him ***C. R. Barry***), for the demurrer.

The plaintiff describes himself in the plaint as suing in a representative character, as one of the public officers of a Banking Company, and, as such public officer, he prays judgment; but he does not allege that the money sued for was lent by the Bank which he represents; on the contrary, he states the cause of action as accruing to himself in his individual capacity, viz., "money lent by the plaintiff to the defendant, and money paid by the plaintiff for the defendant, at his request." The 6 G. 4, c. 42, s. 10, which empowers such copartnership to sue in the name of a public officer, has

* The particulars, which were of great length, were merely repetitions of the first items in each column, bringing out at foot the balance sought to be recovered in the action. The number placed opposite to each item on the Dr. side was stated to be the number of each cheque.

† The following point was noted for argument by the defendant; that Robert Murray professes to sue herein as public officer of the Provincial Bank of Ireland, and to pray judgment as such public officer on behalf of said Banking Company; and yet the sum claimed appears upon the plaint to have been lent to and paid for the defendant by the said Robert Murray in his individual capacity, and not by said Banking Company or in their behalf.

always received a strict construction: *Thomson v. Birnie* (a); *M. T. 1859. Queen's Bench*
McDowell v. Doyle (b); *Fletcher v. Crosbie* (c). This is a substantial objection, and a ground of general demurrer: *Phelps v. Walker* (d); Common Law Procedure Act 1853, s. 10; *Stephenson v. Quin* (e). The other side will rely on *Keily v. Whittaker* (f); but that was a case after verdict, by which the objection was cured; and Pennefather, B., in his judgment in that case says, "We ought to intend that the Judge below directed the jury properly, and told them (as in point of fact it appears he did) the nature of the contract they were about to try" (g). In that case the public officer was defendant; and more certainty of description is required in a plaint in which he sues, than in a defence in which he is sued.

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M. Morris and Rogers, contra.

The objection made on the other side to the form of the plaint might be good as a special demurrer, but cannot be a ground of general demurrer. Every reasonable intendment is to be made for this plaint, which sufficiently shows that the plaintiff sues in a representative character for a debt which is alleged to have accrued to the copartnership which he represents; and, on that ground, *Stephenson v. Quin* is distinguishable from the present case. The plaint describes the plaintiff as one of the public officers of the Provincial Bank, and alleges that the plaintiff, "as such public officer, sues in this behalf, as nominal plaintiff, for and on behalf of the said society or copartnership, and who complains that the defendant is indebted to the said copartnership in £320. 18s. 3d., besides interest, as hereon indorsed, money lent by the plaintiff, &c., the particulars of which are indorsed hereon," and he then prays judgment as public officer. Taking the plaint together with the indorsement of particulars, it appears clearly that the contract, which is sued on, was a contract with

(a) 2 Ir. Law Rep. 234.

(b) 7 Ir. Com. Law Rep. 598.

(c) 9 M. & W. 252.

(d) Cr. & D., Not. Cas., 141.

(e) 7 Ir. Com. Law Rep. 314.

(f) 1 Ir. Law Rep. 28.

(g) p. 34.

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the copartnership on whose behalf the plaintiff sues. But even taking the plaint most strictly against the plaintiff, it discloses a contract with the plaintiff, who describes himself as suing as a public officer; and then the present case is ruled by *Keily v. Whittaker (a)*, in which such an objection as this was held to be untenable; Pennefather and Forster, BB., being of opinion that it appeared from the declaration, which was similar to the plaint in the present case, that the contract was made with the public officer in his representative capacity, and that, that was sufficient. The circumstance that the public officer was the defendant in *Keily v. Whittaker* makes no difference between that case and the present one. The other cases relied upon on the other side are distinguishable from the present case both in their facts and in their pleadings, no such objection as the present having been made in any of them.

C. Barry, in reply.

The Common Law Procedure Act requires that the plaint shall disclose a good cause of action, and this plaint discloses none as accruing to the plaintiff as public officer. *Keily v. Whittaker* is explained in *Thompson v. Kelly (b)*; in which case Brady, C. B., says, "The case of *Keily v. Whittaker* has been strongly relied upon by the plaintiff's Counsel here, but the judgment of the Court in that case has been very much misapprehended in the argument. There the defendant was sued as nominal defendant, on behalf of a certain society or copartnership; and the Court said that, after verdict, and at that stage of the proceedings, it must be intended that the contract was entered into by the copartnership," &c.; and Pennefather, B., who delivered a judgment in *Keily v. Whittaker*, concurred in the judgment and reasons of Brady, C. B., in *Thompson v. Kelly*. It is plain, therefore, that the defect in the declaration in *Keily v. Whittaker* was held to be cured after verdict. The present case cannot be distinguished from *Stephenson v. Quin*.

Cur. ad. vult.

(a) *Supra*.

(b) 6 Ir. Law Rep. 32, 38.

PERRIN, J.

I have considered this case with my Brother O'BRIEN, and concur in the judgment which he will now deliver.

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O'BRIEN, J.

This is an action for money lent and money paid. The plaintiff, in the commencement of the plaint, states himself to be the public officer of the Provincial Bank, under the statute in that behalf, and that he sues *as* such public officer on behalf of said Bank; and he complains that defendant is indebted to the Bank in the sum of £320. 13s. 3d. But when he comes to state how that debt accrued, he alleges it to be "for money lent *by the plaintiff* to the defendant, "and for money paid *by the plaintiff*, for the defendant, at his request." The defendant has demurred to the plaint, on the ground that, although the plaintiff is described as suing as public officer of the Bank, the cause of action is stated to have accrued to himself individually, and that the loan or payment of money, stated as the cause of action, is alleged to have been made by himself, and not by the Bank on whose behalf he sues. The plaintiff relies upon the provisions of the Act of the 6 G. 4, c. 42 (which regulates the proceedings to be taken by copartnerships such as the Provincial Bank), and contends that the summons and plaint is sufficiently in accordance with that statute, and that the money mentioned in the summons and plaint should reasonably be intended as having been the money of the Bank, and lent and paid by them. We are all, however, of opinion that the defendant's objection is well founded, and that the demurrer should be allowed. The 10th section of the Act in question provides that all proceedings at Law or in Equity, to be instituted "for and on behalf of such copartnership," are to be brought in the name of any one of the public officers, as the nominal plaintiff, "for and on behalf of such copartnership;" and that all indictments and informations for stealing the moneys, &c., of the Company shall be preferred in the name of any one of the public officers; and that in all such indictments and informations "it shall be lawful and sufficient to state the moneys, &c., or other "property of such society or copartnership, to be the money, &c., of "any one of the public officers nominated as aforesaid, for the time

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"being, of such society or copartnership;" and that all offences committed with a view to defraud or injure the copartnership are to be stated in the indictment "to have been committed against, or" "with intent to injure or defraud, any one of the public officers" "nominated as aforesaid, for the time being, of said copartnership."

It is to be observed that the provisions of this section, as to proceedings on behalf of such copartnership company being carried on in the name of the public officer, are nearly similar in respect of civil and criminal proceedings; but that, although the section expressly provides, as to criminal proceedings, that in all indictments, &c. the property alleged to have been stolen or injured (though actually the property of the Company) should be stated as being the property of the public officer, and that the crime charged to have been committed against the Company should be stated as having been committed against the public officer; yet there is no corresponding provision that, in civil proceedings, the pleadings should state the property, contract, or injury in respect of which the action is brought as having belonged to, and been made with, or committed against the public officer. The omission of such a direction as to the pleadings in civil cases, while it is expressly given as to criminal, would show that it was not intended, by the Act, to alter, to that extent in civil cases, the ordinary rules for the statement of the cause of action. In an indictment for stealing the goods of the Company, they should, under the statute, be alleged to be the goods of the public officer; but, if an action of trover was brought for those goods, there is no provision in the Act authorising such a statement in that action; and it appears to me that an enactment of the Legislature would be equally requisite in civil as in criminal cases, to sanction such a departure from the well settled rules of pleading. No difficulty is imposed upon a plaintiff by this construction of the statute, or by his being obliged to state, according to the fact, that the property, contract, &c., in respect of which the cause of action has arisen belonged to or was made with the Company on whose behalf the action is brought. A form of pleading to that effect will be found in 2 *Child Pleading*, 5th ed., 1831, p. 36. In the case of *Hunter v. Morgan* (a).

(a) 2 Hud. & Br. 119.

which was an action brought by the Secretary of the St. Patrick's Insurance Company, as nominal plaintiff, on behalf of the Company, under a provision of their Act, upon a bond executed by defendant to three other persons, treasurers of said Company, it appeared, by the condition of the bond, that it was executed to secure the property of the Company, and for their benefit; and it was held, under these circumstances, that the action was properly brought by the Secretary, as nominal plaintiff, and was sustainable on general demurrer; it appearing from the condition of the bond, which was set out upon oyer (and thereby embodied in the pleadings), that the debt claimed to be due on the bond was actually due to the Company. In the case now before us, the action, though brought in the name of plaintiff as public officer, is the action of the Bank, to recover a debt claimed as due to the Bank; but the pleadings do not show how that debt or right of action accrued to the Bank, as it cannot be said that the loan or payment of the money by the plaintiff *himself* would sustain an action by the Bank.

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The plaintiff's Counsel have, however, further argued, that the reasonable intendment, from the summons and plaint, should be, that the money, alleged to have been lent and paid, was, in fact, the money of, and was lent and paid by, the Bank; and Counsel rely, in support of this argument, upon the judgment of Baron Pennefather, in *Keily v. Whittaker* (a). We do not, however, think it follows from that case that, *upon demurrer*, such an intendment should be made, at variance with the actual statement in the pleadings. That was an action for work and labour, and on the money counts, brought against the defendant as public officer of a Banking Company, under the same statute, 6 G. 4, c. 42; and an application was made to the Court, that the verdict obtained against the defendant might be set aside, upon the ground that the declaration stated the contract and promises to have been made by the defendant individually, whereas, by the evidence at the trial it appeared that the contract and promises were made by or on behalf of the Company. The Court refused the application, Baron Pennefather stating (p. 33), that the fair and necessary intendment, on the whole of

(a) *Supra*.

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any *one* of the public officers of the copartnership, as nominal plaintiff. Now, as an illustration of the principle I have mentioned, and of the strictness with which this statute is to be construed, the case of *Thomson v. Birnie* has decided that an action cannot be brought in the names of *two* public officers, the statute speaking of only *one*. The statute says not a word as to the mode in which the cause of action is to be stated. It must, therefore, be stated as it would have been before the statute, and according to the truth and fact. Without any statutable authority, the pleader has no right to allege that money was lent or paid by the plaintiff, which was, in truth, lent or paid by the Bank of which the plaintiff is a public officer. In corroboration of this view, I may refer to a subsequent part of the same section, which expressly provides that, in a prosecution for an offence against the property of the Bank, the property may, for the sake of convenience, be laid in the public officer, and not in the members of the Banking Company, according to the truth and fact. Does not this go to show that, when the Legislature intends there shall, in pleading, be any deviation from the previously existing rules, it takes good care to express that intention?

Demurrer allowed. Leave to amend.

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Exchequer Chamber.

CUMMINGS v. MERRICK.*

(*Error from the Queen's Bench.*)

Nov. 7.

THIS case is reported in the Court below, 9 *Ir. Com. Law Rep.*, p. 249. *Merrick v. Cummings* (9 *Ir. Com. Law Rep.* 249) affirmed.

R. J. Lane and *C. H. Woodroffe*, for the plaintiff in Error, the defendant below.

E. Sullivan and *Jellett*, for the defendant in Error, the plaintiff below.

Judgment affirmed.

* *Coram* MONAHAN, C. J.; PIGOT, C. B.; BALL and CHRISTIAN, JJ.; FITZGERALD and HUGHES, BB.

BEAUMAN v. KINSELLA.*

(*Appeal from the Queen's Bench.*)

Nov. 8, 9, 10,
 18.

THIS case in the Court below is reported, 8 *Ir. Com. Law Rep.*, p. 291. The plaintiff appealed from the judgment of the Court of Queen's Bench. *Beauman v. Kinsella* (8 *Ir. Com. Law Rep.* 291) reversed, and a new trial awarded; on the grounds, first, that the plaintiff's orders to his water-bailiffs were inadmissible in evidence without proof of acts done by

Serjeant *Fitzgibbon* and *Ryan*, for the appellant.

J. E. Walsh and *W. M. Gibbon*, for the defendant.

MONAHAN, C. J., delivered the judgment of the Court, by which the order of the Court of Queen's Bench was set aside, so far as it

the bailiffs in pursuance of those orders; but, having been received in evidence, were materially calculated to influence the mind of the jury in finding a verdict for the plaintiff; and, secondly, that the evidence in the case was not sufficiently satisfactory to warrant the Court to order the verdict to be entered for the defendant.

* *Coram* MONAHAN, C. J.; PIGOT, C. B.; BALL and CHRISTIAN, JJ.; FITZGERALD and HUGHES, BB.

M. T. 1859. directed the verdict to be entered for the defendant, and affirmed *Esch. Cham.* as far as it set aside the verdict found for the plaintiff at the trial; a new trial awarded, and each party ordered to bear his own costs of the whole case; on the grounds, first, that the orders of the plaintiff to his water-bailiffs were inadmissible in evidence without proof of acts done by the bailiffs in pursuance of those orders, and that such evidence was not of a trifling character, but was calculated to influence the jury in finding a verdict for the plaintiff; and secondly, that the evidence in the case was not sufficiently satisfactory to warrant the Court to order the verdict to be entered for the defendant.

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M. T. 1858.

Nov. 3.

H. T. 1859.

Jan. 14, 15.

E. T. 1860.

April 20.

T. T. 1860.

May 30.

BRISCOE v. DRUGHT.*

(Appeal from the Queen's Bench.)

For upwards of fifty years the rain-fall and drainage of the main street of a town, situate on the slope of a hill, had, for the convenience of the inhabitants, run down through a kennel on each side of the street into a culvert, which connected the kennels at the end of the street, and discharged its contents into an open lane, through which they flowed into the plaintiff's drain, and were used by him for agricultural purposes, the surplus flowing off into the Shannon. There was no definite channel for the stream of water and sewage to flow in through the lane, which was the passage to the fair-green of the town, and was the property of the defendant; but the lane being lower at one side than the other, the stream flowed along the lower side, spreading more or less over the surface of the lane, and sometimes in floods covering the entire surface. The defendant having stopped the passage, by which the stream at the end of the lane flowed into the plaintiff's drain, and diverted the water into a drain upon his own land:—*Held*, that there was evidence of a watercourse, viz., water flowing between banks more or less defined:—

That, as long as the inhabitants of the town permitted the water and sewage to continue so to flow, the plaintiff had, as against the defendant, acquired a right, by presumption of grant, to have it continue to flow into his drain; and that the defendant had, as against the plaintiff, acquired, in like manner, a correlative right to have the flow continue, without such obstruction by the plaintiff as would flood or injure the defendant's lands.—[FITZGERALD, B., *dissentiente*].

Semble.—That the inhabitants of the town had, as against both the plaintiff and

* *Coram* MONAHAN, C. J.; PIGOT, C. B.; KEOGH and CHRISTIAN, JJ., and FITZGERALD and HUGHES, BB.

for a period exceeding twenty-six years, at either side of the main street of the said town, through which rain-water, soil, &c., and other matters valuable for the formation of manure, had flowed, and been carried along until they came to two gullets of considerable depth, situate opposite to and at the commencement of a roadway leading to the plaintiff's close; that the gullet on the right side of the street communicated with that on the left by a sewer running under the street, from whence the rain-water, &c., flowed on the said roadway leading to the plaintiff's said close by an open channel, until it came to another gullet at the entrance-gate of the said close, into which last-mentioned gullet the rain-water, &c., flowed into a certain large cess-pool and drain, being the boundary of the said close, whereby a deposit was accumulated, and a quantity of manure supplied to the plaintiff every year; yet the defendant, well knowing, &c., but contriving, &c., and to prevent the plaintiff from enjoying the flow of the said water, and the accumulation of the said manure, in so abundant and beneficial a manner as he had theretofore done, and been accustomed to do, and of right ought to have done, on, &c., and on divers other days, &c., caused the course of the said water to be turned, at a distance of about four yards at the Banagher side of the plaintiff's gullet, and carried away from the plaintiff's drain, by means of a new channel or sewer, which the defendant caused to be sunk across the said roadway through a new gullet, whereby the said water, &c., was emptied and discharged into a certain other drain running, &c., separated from the plaintiff's said close, and being the boundary of a certain other close called, &c., in the possession of the defendant; and that the defendant had

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defendant and all intervening proprietors, acquired an easement of having their drainage transmitted through the lane into the Shannon; but, that neither the plaintiff, nor defendant, nor any other intermediate proprietor, could, as against the inhabitants of the town, insist on the continuance of the flow of water and sewage, if the inhabitants, or any of them, chose to stop or divert its flow, or alter their system of drainage.

When the question at the trial is, whether there is a watercourse or not, the Judge ought, before he leaves that question to the jury, to instruct them as to what constitutes a watercourse in law.

To constitute a watercourse, in which rights may be acquired by user, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbour's land. Water which squanders itself over an indefinite surface is not a proper subject-matter for the acquisition of a right by user.

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completely stopped up the plaintiff's gullet, notwithstanding he had been cautioned by the plaintiff not to do so; and that the defendant had altogether diverted the said water, &c., from the original and accustomed course into the defendant's said boundary drain, whereby, &c.

The second count stated that the plaintiff was, for a period exceeding twenty years, lawfully possessed of a certain other close, near a certain other channel or watercourse, through which a certain other stream had been accustomed to run and flow, and of right ought to have run and flowed, into the cess-pool and boundary drain of the plaintiff's last-mentioned close, for supplying the same with necessary water, &c.; yet the defendant, well knowing, &c., but intending to deprive him, &c., on, &c., and on divers other days, &c., wrongfully and unjustly diverted, &c., the water of the said last-mentioned channel from flowing along its usual course into the said last-mentioned cess-pool and boundary drain of the plaintiff, and from supplying the same with water for the necessary formation of manure, &c., as the same ought, and otherwise would, have flowed; and the plaintiff, for want of such sufficient water, &c., had been injured in the enjoyment of his said close, &c.

Defences to the first count.—First; that the cess-pool was not the cess-pool of the plaintiff. Second; a traverse of the plaintiff's right to the flow of water. Third; that the water and accumulations were wrongfully flowing into the plaintiff's cess-pool; and, therefore, the defendant caused the new gullet to be sunk across the roadway, as alleged.

Defences to the second count.—First; a traverse of the plaintiff's right to the flow of water. Second; that, before the alleged grievance, the stream flowed in a certain manner, and of right still ought to have flowed in the same manner, without flooding the defendant's lands, and would so have flowed, but for the accumulation of mud, which obstructed the watercourse, and caused the plaintiff's land to be flooded; and that, in order to relieve his land from such flood, the plaintiff did the act complained of.

The following issues were knit on the defences to the first count:—First; whether the cess-pool or drain was the cess-pool

or drain of the plaintiff, as alleged? Second; whether the water, &c., did of right flow into the cess-pool, as alleged, and whether the plaintiff ought to have enjoyed the same, as alleged? Third; whether, before the alleged grievances, the water, &c., ought of right to have flowed into the drain running at the opposite side of the roadway, and by the roadway separated from the plaintiff's close, as in the third defence alleged? Fourth; whether the water, &c., was wrongfully flowing into the cess-pool of the plaintiff, as in the third defence alleged? On the defences to the second count.—First; whether the stream ought of right to have flowed into the cess-pool, as alleged? Second; whether, before and at the time of the alleged grievance, the stream formerly flowed in the manner mentioned? Third; whether the stream, but for the accumulations of mud, would have flowed, as in the fifth defence alleged? Fourth; whether the stream caused the land of the defendant to be flooded, as in the sixth defence mentioned, and whether the defendant did the act complained of to relieve his lands, as in the fifth defence mentioned?

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Upon the trial, before Monahan, C. J., at the Summer Assizes, 1858, for the North Riding of the county of Tipperary, it appeared in evidence that the plaintiff was possessed of a close or piece of land near the fair-green of the town of Banagher, called "The Old Fair-green," under a subsisting lease, dated the 3rd of March 1831, which contained the following clause:—"Briscoe to have manure of road and drain leading to and mearing said demised premises."

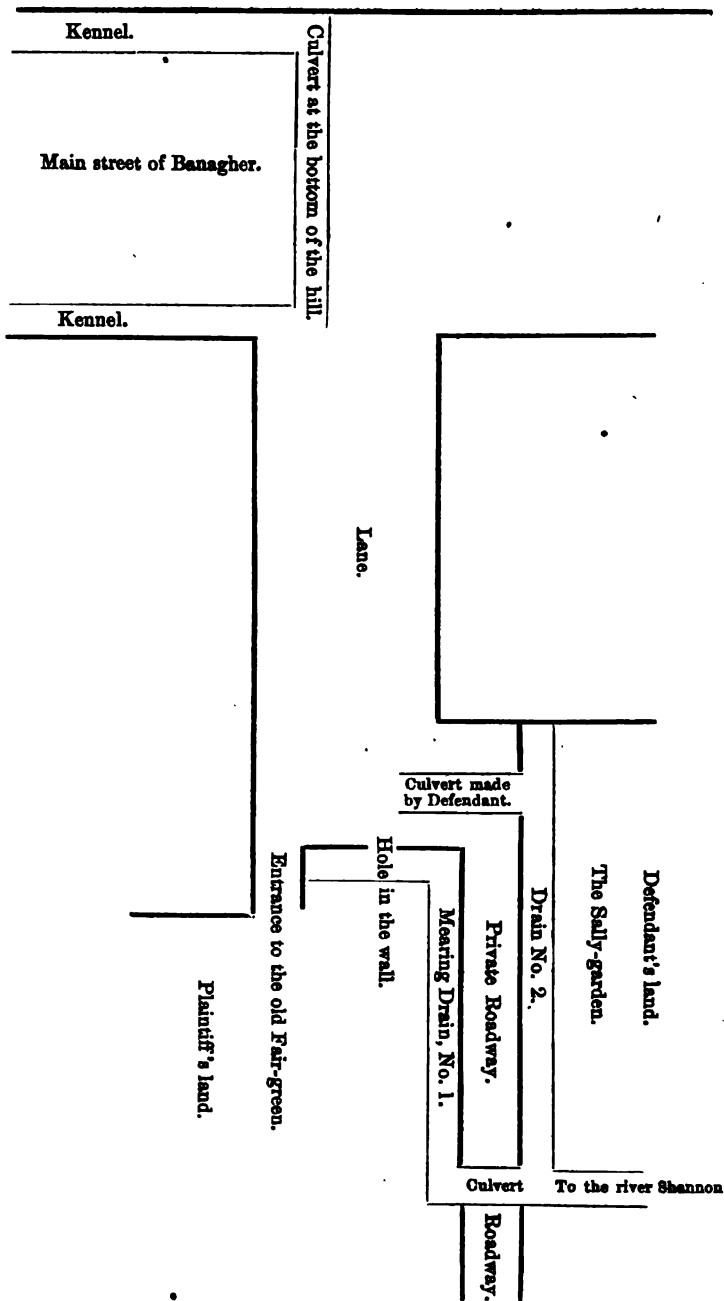
That this close was separated on one side of it by a roadway from land of the defendant, called "The Sally Garden." That on each side of this roadway there was a drain running in the direction from the town of Banagher. That the drain next to the plaintiff's close (called, for distinction, No. 1 drain) formed the boundary between his land and the defendant's; so that half that drain (No. 1), the roadway and the drain on the other side (called, for distinction, No. 2 drain), was the soil of the defendant. That the mearing drain (No. 1) turned at right angles on this roadway from the side of the plaintiff's close, which looked towards Banagher; and that on that side it also constituted the boundary between the plaintiff's close

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and other land of the defendant; and that at that side there was a passage to the plaintiff's close from the town of Banagher by a lane, which was on and constituted part of the last-mentioned land of the defendant. That into the plaintiff's mearing drain (No. 1) at this, the Banagher side, of the plaintiff's close, an opening was made through a wall from the lane, more than twenty years ago; this wall was built on the edge of the drain by a former owner of the defendant's land, and was near the place where the lane from Banagher terminated, and that there was a passage by the side of the plaintiff's close from the lane to the roadway first-mentioned. That, through the opening thus made in the plaintiff's wall, a considerable portion, if not the whole, of any water flowing down the lane from the town of Banagher would, of course, pass into the mearing drain (No. 1), half of which was the property of the plaintiff. That the main street of the town of Banagher was on the slope of a high hill. That on each side of the street there was a channel constituting the kennels of the street, by which rain-water, sewage and matters valuable as manure were carried down the street. That the kennels were connected at the bottom of the hill by an under-ground culvert crossing the street, through which their contents were thrown on the surface of the lane, which was the property of the defendant, and which formed the passage from Banagher to the fair-green or close of the plaintiff. That there was no definite channel for the water and sewage through this lane, but that one side of it was lower than the other, and the water and sewage flowed along the lower side in a considerable quantity, and, when its volume was increased in wet weather, it spread more or less over the surface of the lane, and sometimes over the entire surface. That stepping-stones were, for the convenience of passengers, placed across the end of the lane near the fair-green. That for upwards of sixty years the water and sewage had thus flowed through the lane, and ultimately into the Shannon. That the defendant had stopped up the hole in the plaintiff's wall, and diverted the flow of water and sewage into his own drain (No. 2), by means of another culvert, which he had constructed from the end of the lane into his own drain (No. 2).*

* The following plan will show the relative positions of the premises; see next page.

PLAN REFERRED TO IN PRECEDING PAGE.



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Upon this evidence the defendant's Counsel called upon the learned Lord Chief Justice to tell the jury that, inasmuch as the evidence showed no defined watercourse or channel for the water to flow through when passing over the defendant's land, and, inasmuch as the right claimed by the plaintiff arose out of the flooding of the entire lane, no such right could exist in point of law. The Lord Chief Justice, however, refused so to direct, and the jury found for the plaintiff on all the issues, except the first, as to which they stated that only half the drain (No. 1) belonged to the plaintiff; whereupon Counsel for the defendant submitted that the verdict should be entered for the defendant, the jury having negatived the plaintiff's claim to the drain, and having thereby in effect found the main question against the plaintiff. The Chief Justice permitted the verdict to be entered for the plaintiff, but saved the above points.

M. T. 1858. *Rollestone* having accordingly obtained a conditional order for a
 Nov. 3. new trial, on the 3rd of November 1858—

H. T. 1859. *J. Wall* and *J. E. Walsh* now showed cause.
 Jan. 14, 14. *Rollestone* and *D. Lynch*, in support of the conditional order.
 The Court allowed the cause shown.

The defendant now appealed from this order.*

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 E. T. 1860.
 April 20.

J. E. Walsh and *Ryan*, for the appellants.

The plaintiff brought his action for an injury to the entire of the drain (No. 1); but the jury have found on that issue that he was

* The points noted were:—1. That inasmuch as the jury found on the first issue that only half the cess-pool or drain belonged to the plaintiff, who had claimed the entire thereof, the defendant was entitled to a verdict on that issue. 2. That, inasmuch as no defined watercourse or channel was shown to have existed over defendant's land, but plaintiff's claim appeared in evidence to amount to a right to water arising from occasional floods, spreading over the whole surface of the lane, before it reached the drain or cess-pool claimed by plaintiff, and having no defined channel, the learned Judge should have told the jury that the plaintiff was not entitled to a verdict on the issues as to the right of the plaintiff to have the water flow in the manner claimed by him.

only entitled to half of this drain, the finding on that issue is, therefore, in favour of the defendant: *Murly v. M'Dermott* (a). Next, the water, the diversion of which is complained of, was mere surface water, its supply was casual, its course undefined; and the plaintiff, therefore, cannot legally complain that the defendant has intercepted it before it reached the drain in question: *Rawstron v. Taylor* (b); *Greatrex v. Hayward* (c). The right of the landowner to appropriate the surface water which flows over his own land is now well established, even though by doing so he prevents the water from reaching a channel which it had formerly flowed into: *Wood v. Waud* (d); *Broadbent v. Ramsbotham* (e), which is followed in *Chasemore v. Richards* (f).—[PIGOT, C. B. Is there a defined watercourse in the present case?—No; first, the flow of water is only casual, dependent on temporary circumstances, and intermittent in its character: *Arkrigh v. Gell* (g); and this very case is suggested by Pollock, C. B., in *Wood v. Waud* (h):—"The flow of water for twenty "years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, "so as to diminish the quantity of water flowing from the roof." The evidence shows that the plaintiff never could, in the nature of things, have enjoyed the use of this water and sewage as a matter of right. The inhabitants of Banagher could, at any moment, have made any use they pleased of this water and sewage, and may still do so. Secondly; there is no defined watercourse or channel in the present case. The question in all cases of this kind is, whether the water flows continually in a defined channel? The alleged channel is the lane leading to the fair-green of Banagher, not a channel for water to flow in.—[MONAHAN, C. J. The peculiarity of this case is, that this alleged water is, in fact, the sewage of the town of Banagher, which is carried through the town by artificial channels, and ultimately into the Shannon; if the sewage was penned back,

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(a) 8 Ad. & El. 138.

(b) 11 Exch. 369.

(c) 8 Exch. 291.

(d) 3 Exch. 748.

(e) 11 Exch. 602.

(f) 7 H. L. Cas. 349; S. C., 5 Jur., N. S., 873; 29 Law Jour., Exch., 81.

(g) 5 M. & W. 203.

(h) 3 Exch. 748, 778.

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the inhabitants of the town would have some remedy to enforce its free flow. They could also dispose of the sewage otherwise, if they thought fit.—PIGOT, C. B. Do you contend that the lane is not a channel?—Yes; it is a lane for traffic and passengers resorting to the fair-green; and an occasional flow of water of this description through it could not convert it into a defined watercourse. If this action were to succeed, the inhabitants of Banagher will not be able for the future to alter the sewage of the town, if it becomes necessary to do so; and actions will lie against every one of them who intercepts the rain from the eaves of his house, by collecting it in a water-barrel for his own purposes, and thus prevents it from flowing into the street channels, and ultimately reaching the plaintiff. Lord Chelmsford, in *Chasemore v. Richards*, thus puts the analogous case of underground water which flows in no definite channel:—
 “When does this right commence? Before or after the rain has found its way to the ground? If the owner of land, through which the water filters cannot intercept it in its progress, can he prevent its descending to earth at all, by catching it in tanks or cisterns? And how far will the right to this water supply extend?” (a). The judgment of the Court of Queen’s Bench, therefore, was wrong.

J. E. Walsh and Owen, contra.

The fallacy of the argument on the other side is, that the plaintiff seeks to establish a right as against the inhabitants of Banagher; but the question is, has the plaintiff a right to the flow of water which he claims, as against the defendant, whilst the inhabitants permit the water to flow in its present course, in which it has flowed during living memory? Next; the flow of water in the present case is not casual and uncertain, within the meaning of the authorities which have been cited on the other side; it depends more or less, of course, upon the fall of rain; but every mountain stream is subject to the same contingency; and can it be contended that such a stream is not a watercourse, because it may be dry in summer time? It is a natural stream to the end of time, even though it may, during part of its course, be diverted from its natural bed into

(a) 7 H. L. Cas. 375.

an artificial channel. The cases which have been cited are all distinguishable upon the principle that, in each of them the water came into view for the first time on the parties' own land, without having previously assumed any appearance of a watercourse. In the present case the flow of water is natural, although conducted by artificial channels till it arrives at the lane; but even if it were to be considered as an artificial stream, it will not affect the present question, because the evidence of this flow of water goes back as far as 1798, and rights in artificial streams are, after twenty years, on the same footing as rights in natural streams: *Major v. Chadwick* (a), which is approved of in *Wood v. Waud* (b). In *Chasemore v. Richards* (c), it is assumed that once the diversion of the stream can be observed, it may become the subject of private property, and capable of protection. Next, the lane is a watercourse or definite channel: *Rex v. Inhabitants of Oxfordshire* (d). In which case it was held, in England, that the inhabitants of a county are by Common Law bound to repair bridges over water flowing in a channel between banks more or less defined, although the channel might be occasionally dry. The plaintiff, therefore, is entitled to this flow of water so long as the inhabitants of Banagher permit it to continue, and the verdict was rightly entered for him.

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Rollestone replied.

Cur. ad. vult.

HUGHES, B.

This is an appeal by the defendant from the decision of the Court of Queen's Bench, on a new trial motion, on points saved.

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The action was tried before the CHIEF JUSTICE of the Common Pleas, at the Summer Assizes of 1858. It was an action brought by the plaintiff for the disturbance by the defendant of an alleged watercourse, and diverting the water from a certain drain or cess-pool of the plaintiff.

The first issue was, "Whether the cess-pool in the first paragraph

(a) 11 Ad. & El. 571.

(b) *Supra*.

(c) *Supra*.

(d) 1 B. & Ad. 289-301.

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Exch. Cham. "plaintiff, as alleged?"

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DROUGHT. The second issue was, "Whether the water and the accumulation
"of manure, in the summons and plaint mentioned, did of right flow
"into the cess-pool, and whether the plaintiff ought to have enjoyed
"the same, as alleged?"

The jury found for the plaintiff on the second issue, with a farthing damages; and on the first issue they stated that they considered only half the cess-pool or drain belonged to the plaintiff, and a verdict was therefore entered for the plaintiff on both issues.

Two points have arisen, and are now to be decided, and they are, firstly; whether, inasmuch as the jury found on the first issue, that only half the cess-pool or drain in that issue mentioned belonged to the plaintiff, the plaintiff having claimed the entire thereof, the defendant was entitled to a verdict or finding upon that issue? and secondly, whether, inasmuch as no definite water-course or channel was shown to have existed over defendant's land, but plaintiff's claim appeared in evidence to amount to a right to water arising from occasional floods, spreading over the whole surface of the lane, before it reached the drain or cess-pool claimed by the plaintiff, and having no defined channel, the learned CHIEF JUSTICE should not have told the jury that the plaintiff was not entitled to a verdict upon the second issue? The CHIEF JUSTICE refused to give such directions, and the Court of Queen's Bench decided that the rulings of the Judge at Nisi Prius were correct; and the present appeal is from that decision.

It appeared, upon the evidence, that the premises in respect of which these questions arise are adjacent to the town of Banagher; that there are two channels, one at each side of the main street of the town; that they are united by a gullet built across the main street; and that, as far back as memory can extend, the rain-water, scourings and sewage of the town, pouring through those channels and gullet, entered a lane, the property of the defendant Drought, and, up to a recent period (when the transaction occurred out of which this action arose) poured along that lane and entered the drain, called in the course of this case

drain No. 1; and it is in respect of that drain, and the cleansing and profits thereof, that the plaintiff's claim has arisen. In other words, the question is, had Mr. Drought, upon whose "lane" the water and sewage first enter from the main street, a right to interrupt that water and sewage, and prevent it passing into the drain No. 1, which is claimed by the plaintiff Briscoe?

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As to the first point, viz., that inasmuch as the jury found that only half the cess-pool or drain belonged to the plaintiff, the defendant was entitled to a verdict upon the first issue; it appears to me, that the CHIEF JUSTICE and the Queen's Bench were right in holding that, whether the cess-pool or drain were of greater or less dimensions, or whether the plaintiff were entitled to a part only or to the entire of the cess-pool or drain, as the action was brought for an injury to that cess-pool or drain, the plaintiff was entitled to recover.

The second question raises an entirely different and a much more important question, and that question is, what is the legal character of the street water and sewage in question? and what legal rights are capable of being acquired, and were in fact acquired in respect of such street water and sewage? On the part of the defendant, it was contended that, as the water was only occasional, and as there was no defined channel or watercourse for the water to flow through when passing over the defendant's land, and as the water flowed over the surface of the lane, there was, in fact, no watercourse that the law could recognise, and that the plaintiff had not any right in respect thereof.

It appears to me to be clear that the inhabitants of the town of Banagher had acquired, as against the owners of the land and of drain No. 1, a right to have the rain-water and sewage of the town discharged over that lane and through that drain. This right could only have been acquired by actual grant from the owners of the lane and of drain No. 1, or by long user, such as would justify a jury in presuming such a grant. I think it important, for the purpose of determining the rights, as between themselves, of the owner of the lane and the owner of drain No. 1, in respect of this water and sewage, to see what rights could be

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asserted against them both; and I think it clear that the inhabitants of the town had, as against both, the right I have stated. If then, for a period as long as memory can extend to, the inhabitants have exercised this right, as against the owner of the lane, on whom land the water and sewage first enters from the main street, and if, for an equally long period, the water and sewage, after having passed through the lane, have entered into and passed along drain No. 1, it appears to me that the owner of drain No. 1 has acquired, as against the owner of the lane, a right to the continuance of that state of facts, upon the same principle of grant, or presumption of a grant, that the inhabitants of the town have acquired their rights as against the owners of the lane and the drain, unless there be something in the origin or character of the water and sewage to prevent the existence of that right; and it is consistent with common sense that this should be so; because, if the owner of the lane and the owner of the drain are to be presumed to have been parties to a grant conferring upon the inhabitants of the town the right I have mentioned, the owner of the lane and the owner of the drain had, as between themselves, also acquired certain rights and certain liabilities. For instance, the owner of the drain would not be at liberty to close up that drain, as against the owner of the lane, and thus throw back upon the lane the street water and sewage, and keep it permanently there.

It is, however, said that, as the water and sewage had no defined channel, but flowed over the entire lane, that it was not a watercourse. The lane is the passage from the main street to the fair-green, and is in fact a public road. But there is nothing to prevent a watercourse assuming a defined channel upon or alongside a public road. The lane appeared to be twelve feet wide, and one side of it to be higher than the other; and, when the water and sewage from the main street were much in quantity, it flowed along the lower side of the lane; but, when great floods came, they covered more of the surface of the lane, and sometimes the entire of it; but still the water and sewage ran always along the lane, commencing at the low side, and, when the flood required it, gradually rising, and extending over the surface. I am,

therefore, of opinion that there was, in point of fact, a defined watercourse, and the jury have found that there was in fact a watercourse; and I am of opinion that the nature of its passage through the lane does not take from it the quality of passing through a defined channel. I am, therefore, of opinion that the water had, so far as the lane is concerned, a defined channel; but, whether it was artificial or natural in its origin, I am of opinion that, as long as it continued to flow, rights might be acquired, as between themselves, by persons through whose lands it had flowed for a considerable period, although they might not have been acquired against the person who originated or gave form to its source; and, in *Major v. Chadwick* (a), Lord Denman says:—

“The imputed misdirection is, that the law of watercourses is the same, whether natural or artificial. We think this was no misdirection, but clearly right. The contrary proposition, that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water, if proved to have been originally artificial, seems to us quite indefensible” (b).

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It is, however, said that this alleged watercourse is only “occasional” and “temporary,” and that, therefore, no legal right could be acquired in respect of it. But, in my opinion, the legal signification of the words “occasional” and “temporary” is different from that given to them by the defendant’s Counsel. I am of opinion that these words do not refer to the presence or quantity of water dependent on natural causes, such as rain. All watercourses, and particularly all natural watercourses, are affected by rain, and by the absence of rain; and those most affected by the absence of rain do not lose their character of “natural,” by being only “occasional” or “temporary,” in the sense imputed by the defendant; and so, in *Arkright v. Gell* (c), Lord Abinger, in pronouncing judgment, says:—“The flow of water was of a temporary character, having its continuance only whilst the convenience of the mine-owners required it” (d). And the meaning I attribute

(a) *Supra*.

(b) p. 586.

(c) 5 M. & W. 203.

(d) p. 231.

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to the words "temporary" and "occasional" is that, when the volume or duration is dependent on the will or convenience of individuals, it is to be considered temporary or occasional; but, if it is proved that rain-water forms itself, from the nature of the locality upon which it descends, into a visible stream, and, as far back as memory can extend, has pursued a fixed and definite channel for its discharge, in my opinion, the "volume" of the stream may be "occasional" and "temporary;" but its "course" is neither "occasional" nor "temporary." I am, therefore, of opinion that, in this case, there was a "watercourse;" that it was not, in legal signification, "temporary" or "occasional;" that it had a "defined" channel, and that the plaintiff had acquired rights in respect of it, which he was entitled to assert by the present action, and that the judgment of the Queen's Bench should be affirmed.

FITZGERALD, B., after stating the facts above set out, proceeded as follows:—It is for the diversion from this drain of the fluid thus thrown on the defendant's land and flowing down the lane that the plaintiff complains. The defendant so diverted it as to throw it all into the drain next his sally-garden close, which is wholly on his own property. I presume that the inhabitants of the town of Banagher are entitled to the easement of throwing the contents of their kennel on the lane, which is the land of the defendant. The plaintiff insists that he is entitled to have the contents of the kennels flow down the lane into his mearing drain, as they have flowed for the last twenty years and upwards. The claim is certainly to a watercourse of a somewhat novel kind. The defendant now resists the claim, on the narrow ground, "that no defined channel for the flow of water discharged on the surface of the road at Poulbue" (which is the lane already mentioned) "having been shown, and the right claimed arising out of the flooding of the entire road, no such right existed." I assume, as appears to be assumed by the defendant's objection, that, if it could be shown that the contents of the Banagher kennels had a defined channel over the defendant's land, by which they reached the drain mearing the plaintiff's close, the plaintiff's claim must prevail. I assume this, but offer no opinion as

to it, and shall confine myself to the simple point raised by the objection.

It seems to me very clear that, though the inhabitants of Banagher may have the easement of throwing the contents of their kennels on the defendant's soil, yet, *prima facie*, and in the first instance, the defendant would have the right of disposing of those contents as he pleased. It would be impossible to treat the fluid so thrown on his land as flowing water, which is *publici juris*. It appears to me that it is correctly contended by the defendant, that in no possible way can the plaintiff maintain his claim to the flow of it over the defendant's land into the mearing drain, from a twenty years' user, unless there be some defined channel in which it has flowed over the defendant's land to the drain. Now the defendant insists that it is only from the accidental flooding of the lane, in times of considerable rain, that the fluid has ever had anything which could be called a defined channel, and that, even then, the only definition is the limits of the lane which forms the passage from the town of Banagher to the fair-green. Whether the defendant's law be right or wrong, it appears to me that he correctly states the result of the evidence. Into the evidence at length it is not my intention to go, because I think its result is very accurately stated by my LORD CHIEF JUSTICE in his report of the trial, thus:—"As I collected from the entire evidence, there were two defined channels, one on each side of the street of the town, which is on the side of a hill. In case of heavy rain, the water descends with great violence; and, there being a gullet from one side to the other of the street at the end of it, the entire water flowed in a considerable share along the lane or passage in question. During slight rain, one side of the lane being lower than the other, the greater part flowed on that side, *though there was not any defined channel*; but, in case of heavy rain, the *greater part* of the lane or passage was flooded, *particularly at the lower end, where there were stepping-stones.*" This seems to me correctly to state the result of the evidence. In the ordinary state of things—in dry weather, or in slight rains—the contents of the kennels had no defined course over the lane or land of the defendant; but in case of heavy rain, the contents of

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Assuming this to be the state of things, I am of opinion that the plaintiff could not avail himself of his twenty years' user of the fluid, or any portion of the fluid, flowing into the mearing drain through the opening in the wall, as enabling him, by presumption of grant or otherwise, to prevent the plaintiff from diverting the fluid. The water in question, as it originally came on the defendant's land, is mere surface-water, the contents of the kennels of the town, thrown on the surface of his soil. When there, it had never made for itself any definite channel or course; and though, by the accident of flood, it may occasionally have filled the whole lane, and have been restrained, by the boundaries of the lane, from overflowing them, that will not, in my opinion, make the lane a defined channel or course, within the authorities. A defined channel or course, within the authorities, means, in my judgment, a course which the water has made for itself, or, possibly, a channel made by artificial means for it. Here, in the ordinary state of the weather the water had made for itself no good course; and it seems to me impossible to treat the lane as an artificial channel made for conducting it. I am wholly unable to distinguish the case in this respect from that of *Rawstron v. Taylor (a)*, as to one of the points decided in it. In that case, at a place upon moor-land, just outside the defendant's property, was a wet spongy spot. At most seasons of the year, some water rose to the surface, and sufficient collected to flow down the slope of the land. It took a direction on the defendant's land, towards that of the plaintiff. In times of wet, a great body of water flowed down, and, after a long drought, there was hardly any, and sometimes none; there was no regularly-formed ditch or channel for the water, the place where it flowed being constantly trodden in with cattle (there the place was a lane). So much of the water as was not absorbed by the land (and all was not absorbed except in times of drought) found its way down the slope into a ditch, which carried it to the plaintiff's land, and thence down an old watercourse of the plaintiff's. This state of things had con-

(a) *Supra*.

tinued for more than twenty years. Of the diversion of this water the plaintiff complained; and it was held that his action could not be sustained. Parke, B., says:—"I am of opinion that the defendant is entitled to have the verdict entered for him. This is the case of common surface-water, rising out of springy or boggy ground, and flowing in no definite channel, though contributing to the supply of the plaintiff's mill. This water having no defined course, and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases" (a). It may be that, in the present case, there was a question for the jury, whether the water had flowed in any defined course over the defendant's land to the plaintiff's drain; and that, in form, the defendant's objection requires a direction, without leaving any question to the jury. Whether that be or be not its strict construction, I am of opinion that there ought to be a new trial; because it appears to me that, if the result of the evidence was that which the CHIEF JUSTICE considered it to be, the jury ought to have been directed to find for the defendant; and it is clear that they never were so told, and that the attention of the learned Judge was sufficiently called to the necessity of this direction. I think, therefore, that the order of the Queen's Bench ought to be reversed. I offer no opinion on any other matter in the case.

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CHRISTIAN, J.

The question which was raised at the trial seems to me to be one of fact rather than of law; and if there were no more in the case it might be easily enough disposed of. In order, however, to satisfy ourselves whether this verdict is in accordance with the legal rights of the parties, it is necessary to consider the questions of law which were discussed in the argument.

Although the flow of water, the interruption of which forms the subject of this action, has, as of course all water must have, a natural origin, being simply the rain which falls upon the town of Banagher, yet its character of a stream or watercourse, if it possess that character, has been given to it by purely artificial means. This is

(a) p. 382.

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Esch. Cham. Brethren who have preceded me, and which I need not repeat.
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Now I think it is clear that the purpose for which this rain-water was originally so gathered into a stream or watercourse was the convenience of the inhabitants of Banagher; and it may be assumed that they have an undoubted right to have this water, carrying with it the refuse and drainage of the town, still continue to flow, as the evidence shows it has done for at least half a century, through the lands of all intervening proprietors, till it reaches the Shannon: and I think it follows, that those intervening proprietors have, amongst themselves, similar rights; that is to say, that so long as the people of Banagher shall claim the enjoyment of this easement, the proprietors who are higher up on the stream will have a right against those who are lower down, that the stream shall not be obstructed so as to cause flooding of their lands.

But then arises the question, have the lower proprietors a correlative right? As they are bound by this obligation to receive and transmit the water, have they, on the other hand, *a right* so to receive it?

Now, in the first place, I think it is perfectly clear that, as against the inhabitants of the town, no such right exists. If they, or any of them, thought proper, at any time, to restore the rain-water to a state of nature, to break up their system of drainage, or divert it to another direction, no action or other proceeding would lie against them on the part of either Mr. Drought or Mr. Briscoe. The cases which were cited during the argument, and especially two of them, namely, *Arkwright v. Gell* (a) and *Wood v. Waud* (b), are, I think, clear upon that. The case of *Major v. Chadwick* (c), which was relied on by the defendant, will be found explained and distinguished in *Wood v. Waud*. As between the intervening proprietors, however, the question is a different one. It happens that the easement which the towns-people possess, of transmitting their drainage to the Shannon, is not a burthen merely to the intervening tenements, but carries with it a certain benefit. Has each proprietor *a right* to

(a) *Supra.*

(b) *Supra.*

(c) *Supra.*

his share of that benefit? *Wood v. Waud* shows that he has not that right in the same sense as he would have had it if this were a natural stream or river; that is, as one of the ordinary advantages incident to property, and existing independently of grant, actual or presumed. That case of *Wood v. Waud* is rather a complicated one, and the portion of it which bears upon the present is that which regards what was called the Bowling Sough. That was an artificial watercourse, constructed for draining a mine, and carried from the mine through the lands of several successive proprietors, into a river called the Bowling Beck. It had existed for more than sixty years. The plaintiff, one of the lower proprietors, about ten years before the action was brought, appropriated, for the use of his mill, part of the water of the Sough, at a point above its junction with the Beck. The defendant, a proprietor higher upon the Sough, did certain acts by which the plaintiff's supply, taken thus directly from the Sough, was prejudiced. It was held that, for this injury, the action did not lie. The Court first considered the question as regarded the owners of the mine, for relief of which the Sough was constructed, and they came clearly to the conclusion, as had been previously held in *Arkwright v. Gell*, that, if *they* had thought proper to stop up the Sough, no action would have lain against them. But they then proceed (a):—"The owners merely get rid of a nuisance to their works, by discharging the water into the Sough, and cannot be considered as giving it to one more than another of the proprietors of the land through which that Sough is constructed; each may take and use what passes through his land, and the proprietor of land below has no right to any part of that water, until it has reached his own land; he has no right to compel the owners above to permit the water to flow through their land for his benefit, and consequently he has no right of action if they refuse to do so." Now that, at first view, seems to be an authority against the present action. The flow of water in this case has its existence only for the convenience, and during the pleasure, of the people of the town. The owners below have no right to anything except what these people think proper to give them. But, as Chief

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(a) 3 Exch. 779.

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Ersh. Cham. "more than another; each may take and use what passes through
BRISCOE "his land, and the proprietor of land below has no right to any
v "part of that water until it has reached his own land."
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But while that case decides that, from such a state of facts as it was conversant with, no natural rights result, it is obvious that it leaves untouched the question whether, even in such a subject-matter, rights may not be created by grant, actual or presumed. In *Wood v. Waud*, the facts did not admit of such a presumption; because the user by the plaintiff of the water of the Sough, before it joined the river, was for considerably less than twenty years. But in *Arkwright v. Gell*, the very case is put by Lord Abinger, in delivering the judgment of the Court. That case, like *Wood v. Waud*, was one of an artificial Sough, constructed for draining a mine. The action was against persons claiming under the original mine-owners. It was held that no action lay against them. But Lord Abinger says, "The nature of the case distinctly shows "that no right is acquired as against the owner of the property from "which the course of water takes its origin; though, as between the "first and any subsequent appropriator of the watercourse itself, "such a right may be acquired. And so, in the present case, Sir "Richard Arkwright, by the grant of the owner of the surface for "eighty-four years" (that is, from an owner of land under which the Sough was carried, and who had made to Arkwright a lease, for eighty-four years, of the land, and of the stream of water issuing through the Sough), "acquired a right to use the stream, as against "him; and if there had been no grant he would, by twenty years' "user, have acquired the like right as against such owner. But the "user, even for a much longer period, whilst the flow of water was "going on for the convenience of the mines, would afford no presumption of a grant at Common Law, as against the owners of the "mines" (a).

I see no reason for doubting that this is a correct exposition of the law; and, therefore, I am of opinion that, notwithstanding the peculiar origin from which the flow of water in this case proceeded,

notwithstanding that it existed and still exists at the mere will and pleasure of the people of Banagher, still that circumstance alone, if there were no more, would not prevent it from being a proper subject-matter of grant or contract, as between Mr. Drought and Mr. Briscoe; and such a grant or contract may be inferred from user. But there yet remains the question, which is the one I alluded to at the outset, when I said that the question raised at the trial was one of fact, rather than of law. Before you talk of user, you must show that there was something which would be a proper subject-matter for user. You must show that there was what, with legal propriety, could be called a watercourse; that is, a flow of water possessing that unity of character by which the flow on one person's land can be identified with that on his neighbour's. Water which squanders itself over an indefinite surface is not a proper subject-matter for the acquisition of a right by user: it must be, to adopt Lord Tenterden's definition, "water flowing in a channel between banks more or less defined" (a). This is the point to which the objection taken at the trial was directed. I agree that it was a necessary part of the plaintiff's case; and this brings me now to the consideration of what actually passed at the trial.

It was clearly proved that, for considerably more than twenty years before the interruption by the defendant, this flow of water used to come from the town, through the lane, to the plaintiff's drain. It was also clear, upon the evidence, that it was always regarded as carrying with it a certain value; and in the lease (bearing date the 3rd of May 1831) under which the plaintiff holds the land, which is bounded by this drain, it is mentioned as one of the privileges which the lessee is to enjoy, that he is "to have the manure of the road and drain leading to and mearing the demised premises." Accordingly, no question was made, or could have been made at the trial, but that there was a user, such in kind and derivation as would confer a right, if the subject were one in which a right could exist. What the LORD CHIEF JUSTICE did was this:—he left to the jury the question, "Was there in fact a watercourse?" Now that question, by its terms, involved the inquiry, was there

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(a) *Res v. Inhabitants of Oxfordshire* (1 B. & Ad. 301.)

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that which is part of the legal definition of a watercourse, a channel more or less defined? The defendant's Counsel would, I think, have been entitled (if the view I have taken of the law be correct) to have had it explained to the jury, that, before they could answer that question in the affirmative, they should be satisfied, on the evidence, that the stream had flowed in a channel more or less defined; and also, that, before they could find a verdict for the plaintiff, they should be satisfied that there was such a user (which the Judge would explain to them) as would warrant them in presuming a grant. But no such instruction to the jury was asked for. What the defendant's Counsel pressed for was a direction that the learned Judge should direct a verdict for the defendant. The objection in writing handed in at the trial runs thus:—"That no defined channel for the flow of water having been shown, I called upon his Lordship to tell the jury that no such right existed as in summons and "plaint stated." Now it might be a sufficient answer to the objection to say, that the Judge was called on to direct the jury on a question of fact, instead of being asked to leave that question to them, with a proper explanation. However, if we could now see, upon the evidence, that if that question had been left to the jury, they must or ought to have found it in the negative, we probably would not upon this, which, after all, is only a new trial motion, allow a verdict to stand, which, in that case, would be contrary to right. But, on looking at the evidence, I am clearly of opinion that the contrary is the case, and that the learned Counsel for the defendant had a very excellent reason for pressing the LORD CHIEF JUSTICE to direct the jury on the matter of fact; namely, because he knew perfectly well that, if it were left to them, they would find it against him. To determine the question of watercourse or no watercourse, you must look at the whole stream from its source to its discharge, and not merely to a particular part of it. It began in the town; it was gathered then into two artificial drains, connected by a culvert; by these it was conducted to the entrance of the lane. After it left the lane, at the other end, it entered two other artificial drains or ditches, one of them the plaintiff's, and was by those conducted to the Shannon. Now if the lane had not intervened, if the

town drains had been prolonged to the country drains, or *vice versa*, T. T. 1860.
 would there be a doubt that, from its source to its discharge, this Exch. Cham.
 water would have flowed in a defined channel? Is there anything BRISCOE
 then in the lane which can take away that character? The lane is v.
 a footway leading to the fair-green; it is twelve feet wide; it is DROUGHT.
 lower at one side than the other; the water, entering from the
 town drain, flows along the bottom of the incline, rises or falls on
 the lane, according as the rain is more or less; and, in case of heavy
 rain, floods the whole, or the greater part of it; but it cannot
 escape from the lane to the right or left, and it is all delivered into
 the drains or ditches at the country end. Is not then the lane a
 defined channel? Is there any doubt as to the identity of the
 water which leaves it at one end with that which enters it at the
 other? Is there in this stream, from its source to its discharge, any
 breach of that character of continuous unity which enters into the
 legal definition of a watercourse? Suppose this were a natural
 stream, which had existed from the beginning of the world, which
 flowed between natural banks until it reached the lane, which flowed
 between natural banks again after it left the lane, but this short
 intervening space of whose bed was sometimes partly dry and
 sometimes wholly flooded, and when dry was used as a footway,
 would not that be still a watercourse? I am clearly of opinion that,
 whatever doubt may be cast upon the plaintiff's case, founded upon
 the nature of the origin of the stream, there is none at all as to its
 fulfilling the requisite of flowing in a well-defined channel; and,
 therefore, it is entirely different from *Roston v. Taylor*, relied on
 by my Brother Baron FITZGERALD. And as it has flowed in that
 channel for upwards of twenty years, if I be right in the view I
 have taken of the case, it follows that the case contains in it all the
 elements necessary to show that the verdict was in accordance with
 right, and that this appeal should be dismissed.

KEOGH, J.

I concur with my Brothers CHRISTIAN and HUGHES. I do not
 consider that this stream is deprived of the character of a water-
 course, in consequence of its source being rain-water falling from

T. T. 1860. the houses, and on the main street of Banagher ; and, upon the evi-
Exch. Cham. dence, I am of opinion that this was a clearly defined watercourse,
BRISCOE within defined limits ; and, therefore, that the judgment of the Court
v. of Queen's Bench ought to be affirmed.
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PIGOT, C. B.

I also concur in opinion with my Brothers CHRISTIAN and HUGHES, and for the reasons which they have given. I will only add this observation, that, in my opinion, the source of this stream being artificial in its nature, it was perfectly competent for the inhabitants of Banagher to have made any other arrangement they thought fit to dispose of the water, although, by doing so, they might have withdrawn it from the parties entitled to the land below ; and I do not wish to be considered to be of opinion that the owners of the land below could insist upon the continuance of the supply.

MONAHAN, C. J.

I am glad that it has devolved upon the other Members of the Court to deliver judgment in this case ; but, after having given the matter every attention in my power, I have no reason to doubt that the verdict ought to be upheld, and the judgment of the Court of Queen's Bench affirmed.

Judgment affirmed.

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Queen's Bench

JOHN SCANNELL, *Appellant*;
 EDWARD FRENCH, *Respondent*.

(*Queen's Bench.*)

Jan. 20.

APPEAL from the decision of Magistrates in Petty Sessions, upon a case stated under the 20 & 21 *Vic.*, c. 43. It appeared from the case that the respondent, a road contractor, on the 19th of November 1859, served a notice upon the appellant, requiring him, pursuant to the statute in that case made and provided, within ten days to remove any matter or thing obstructing or preventing the free and uninterrupted flow of the water running through and over the appellant's lands, at, &c., from that portion of the public road which adjoined and ran alongside appellant's premises, and commencing at, &c., and ending at, &c., whereof the respondent was the contractor. The appellant, not having complied with this notice, was summoned before the Magistrates sitting at the Petty Sessions of Douglas, county of Cork, to show cause why such obstruction should not be removed. It appeared from the evidence of French, the complainant below (the respondent above), that he had called upon Scannell, the appellant, to remove the obstruction to the passage of the water off the road, near his house, as being the passage for the water. That, in rainy time, the road was overflowed, and that, in consequence of Scannell's neglecting to remove said obstruction, there was no other way for the water to flow off the road but through Scannell's ground, and that, if the passage required by the notice was not made, the road would remain overflowed. That the place where water formerly ran into Scannell's ground was a flat open in the ditch, close to Scannell's house, and level with the road. From the evidence for the defence it appeared that the ground of one Anne Landers lay inside, or at the reere of, and lower than Scannell's, and that the water which

The closing up of a flat open or gap in a ditch, through which the occupier of land contiguous to a public road was in the habit of drawing manure for, and of passing into, his said land, and which was the only way whereby water flooding the public road could flow off, is not an obstruction within section 9, par. 1, of the 14 & 15 *Vic.*, c. 92; and, therefore, an order of Magistrates in Petty Sessions, requiring the occupier of the land to remove such obstruction to the passage of the water, is not authorised by that section, and cannot be sustained.

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ran from the high road came down through Scannell's land, and through the ditch between Scannell's and Landers' land, into Landers' land; that it was only when the water overflowed in rainy seasons that it came through Scannell's land into that of Landers. That there was no drain or passage for the water off the road into Scannell's land, except a gap in the ditch, through which Scannell brought manure for his land (an inclosed vegetable garden), and through which, as well as other places in the ditch, the water broke and flowed in wet weather, when the road was flooded. That Scannell's house and land was the lowest part of the road, and that the gap was closed up by Scannell. The order of the Magistrates, dated the 15th of December 1859, was as follows:—"Ordered to remove the obstruction to the passage of the water off the high road complained of, within ten days, as required by the notice of the 19th instant, according to section 9 of 14 & 15 Vic., c. 92." Scannell appealed from this order.*

Jellett, for the appeal.

Section 9, par. 1, of 14 & 15 Vic., c. 92, provides for two cases: first, requiring that the owner or occupier of any lands contiguous to any public road should scour the ditch or drain leading from such public road, so as to allow the water to pass away; and, secondly, prohibiting him from suffering the passage of the water to be obstructed, by leaving any way or passage from any road

* NOTE.—The points noted by the appellant were, first, that the order of the Justices was not authorised by the 9th section of the 14 & 15 Vic., c. 92, under the powers of which the same purports to be made. Secondly; that the order of the Justices is uncertain, in not stating the nature of the obstruction thereby required to be removed, or the time when, or the place at which, the said obstruction was caused. Third; that the said order does not contain in itself a complete adjudication on the subject-matter of the said complaint, or state the nature of the act to be done by the appellant. Fourth; that, even assuming that the notice of the 19th of November 1859 could, by reference, be incorporated into the said order, an order made in the terms of that notice is not authorised by the statute under which the same purports to be made. Fifth; that the said order does not on the face of it show that any such notice or request, as required by the statute 14 and 15 Vic, c. 92, was served upon or made to the appellant, previous to the making of the said order.

into the adjoining lands, or into his house, without a sufficient pipe or gullet underneath it. Now all the witnesses concur in stating that there is no drain leading from the road into Scannell's land, but that there were gaps, through which the water from the road flowed. This Act of Parliament is not directed against any obstruction to the flow of the water from the public road, but is confined to an obstruction of a particular kind, by an owner or occupier of adjoining lands, "making or having any way or "passage from any road into the adjoining lands, or into his house, "without a sufficient pipe, &c., underneath it." The meaning of this portion of the section is, that when water runs parallel to the road, then, if its passage be obstructed by the party not putting a pipe or gullet under the way or passage which causes the obstruction, the party guilty of such omission is subject to the penalty imposed by the Act.—[LEFROY, C. J. It appears from the evidence that there was an opening in the ditch which led from the road into Scannell's land.]—Then, assuming that such opening is a drain, the contractor should have required Scannell to scour it, under the former portion of the clause, and not to remove an obstruction, under the latter portion.—[LEFROY, C. J. The Act does not quite meet this case; and it would be straining its language too much to hold that this is a passage or way whereby the passage of the water is obstructed, by not having a pipe or gullet under it. This is merely a way used occasionally by Scannell, for bringing manure to his garden. In stopping up this gap, an obstruction to the passage of the water is, no doubt, caused; but, it appears to me that the Act of Parliament does not provide for such a case as this, and is wanting in language sufficiently ample to carry out its probable intention.—HAYES, J. The whole evil would have been got rid of, had the clause of the section been expressed in terms somewhat to this effect:—"Any owner "or occupier who shall omit to scour any ditch or drain, &c., or "who shall, in any way, obstruct the passage of the water from "the road into the adjoining lands." This was evidently the construction which the Magistrates thought should be put upon this

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H. T. 1860. section; for by their order they directed the removal of the obstruction to the passage of the water off the high road].

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W. O'Brien, in support of the order.

All the witnesses agree in this, that this gap in Scannell's ditch is the only passage for the water from the road. What the Legislature evidently intended to provide against was the obstruction of the passage of the water, not the mode of that obstruction. Statutes should be construed so as to suppress the mischief against which they are directed.—[HAYES, J. The terms of the clause of the section seem to me to point to the case of water running alongside the road, and which may be obstructed in its course by a way or passage being constructed leading from the road into the adjoining lands.]—The notice points out the obstruction, and the Act under which it is to be removed.—[HAYES, J. No matter how good the notice is, it is of no avail unless the obstruction complained of comes within the Act.]—By section 24, no order made under the Act shall be quashed for want of form.—[LEFROY, C. J. This is not a mere technical objection. However the framers of the Act may have intended to provide for every case of obstruction, they have failed in expressing themselves so as to include the present case within the Act.]—This gap leading into Scannell's land may be considered a sort of drain.

LEFROY, C. J.

This Act of Parliament, instead of stopping with the word "obstructed," in this clause of the 9th section, goes on to specify a distinct kind of obstruction, within which that complained of in the present case does not fall. The Act may be amended, so as to embrace obstructions of every kind; but, as it now stands it is, in its terms, confined to the suppression of one particular species of obstruction. The order of the Magistrates, therefore, cannot be sustained.

O'BRIEN, J.

The grand jury may present for a drain, for the purpose of

carrying off the water from the road, which, when made, will bring the case within the Act; for then the owner or occupier of the adjoining lands will be obliged to scour and keep it clean. The object of the latter portion of this clause in section 9 is to prevent the owner or occupier of lands adjoining a road making a way or passage into his lands, whereby the flow of the water along the road would be obstructed.

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HAYES, J., concurred.

See Re Little (Ir. Cir. Rep. 322).

THE QUEEN, at the prosecution of GEORGE FETHERSTONE,

v.

SAMUEL RIALI and W. H. RIALI; and

In the Matter of JOHN FETHERSTONE, an alleged Lunatic.*

Jan. 23, 24.

T. HARRIS, in the former of these cases, on the 2nd of November 1859, obtained a conditional order, directed to the said Samuel Riall and W. H. Riall, two of her Majesty's Justices of the Peace for the county of Tipperary, to remove into this Court all and sin-

An order of Justices, committing a person to gaol as a dangerous lunatic, under the 1 & 2 Vic., c. 27, and the

8 & 9 Vic., c. 107, is not valid, unless there appear, upon the face of the information upon which that order is founded, facts showing, first, that the person was discovered and apprehended under circumstances denoting a derangement of mind; secondly, that he had a purpose of committing an indictable offence; and, thirdly, that such person was a dangerous lunatic. It is not enough that there should appear, on the face of the information, matters from which, by possibility, the case might be one coming within those Acts of Parliament; the grounds must be shown, establishing the several requirements of those statutes as facts.

An order of committal, therefore, of a person as a dangerous lunatic, founded upon informations which stated that such person was found trespassing in a certain demesne, of which he asserted he was the lawful possessor, and refused to leave, and violently assaulted those removing him, and threatened the owner of the demesne, is invalid.

When a person is in custody under an order of Justices sitting in Petty Sessions, the proper course of proceeding is not to apply to the Superior Court for a *certiorari* to remove; the order of Sessions, for the purpose of quashing it, but to apply for a

* FERRIN, J., *absente*.

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H. T. 1860. section 147. In the Queen's Bench, in the case of Scannel v. French, the following facts were proved:—That on the 14th of January 1859, the said John Fetherstone, an alleged lunatic, on or about the 14th of January 1859, in order that same may be quashed, on the grounds that the committal, signed by said Justices, on the 14th of January 1859, was not warranted by any information sworn before the said Justices, as required by the statute in such case made and provided.

*In the latter of these causes, T. Harris, on the same day, also obtained a conditional order for a writ of *habeas corpus*, directed to the keeper or governor of the Clonmel District Lunatic Asylum, in the county of Tipperary, commanding him to have before this Court the body of the said John Fetherstone, together with the day and cause of his detention. It appeared that, on the 19th of January 1859, the said John Fetherstone having been found by Ralph Osborne, Esq., trespassing in his demesne, as was his constant habit, under a delusion that the demesne was his own, and having been requested by Mr. Osborne to leave the grounds, the said John Fetherstone refused, stating that he was the lawful possessor; and upon Patrick*

*writ of *habeas corpus*, upon the return to which the several documents in the case will, necessarily, be before the Court.*

*A *certiorari* will not be granted, where a person is in custody in a Lunatic Asylum under the warrant of the Lord Lieutenant; he being entitled, under the 8 & 9 Vic., c. 107, to be discharged, upon its being certified to the Lord Lieutenant, as required by that Act, that such person has become of sound mind, or has ceased to be, or is not, a dangerous lunatic.*

*The application for a *certiorari* must be made by the person complaining of the order sought to be brought up for the purpose of being quashed, and cannot be made by another person in his behalf.*

*Where a person committed as a dangerous lunatic allowed two Assizes and two Quarter Sessions to pass, after his committal, without making any application to those tribunals for his discharge, and a period of between nine and ten months to elapse between his committal and his application to the Court of Queen's Bench, this is such laches and delay, on the part of the applicant, as precludes him from obtaining a *certiorari*.*

Semble.—That although delay in applying for a *certiorari* will not, *per se*, be a ground for refusing to grant the application, yet there may be circumstances under which it becomes an important matter to be taken into consideration.

Where Magistrates, by defectively and carelessly discharging duties cast upon them by Act of Parliament, lay the foundation for an application to the Superior Court, they will not be allowed the costs of such proceedings.

*A motion for the writ of *habeas corpus* ordered to stand over, until the person in custody (alleged to be a dangerous lunatic) had been examined by medical men, approved of on behalf of such person and the Crown, to ascertain whether he was then a dangerous lunatic, or only labouring under a harmless delusion.*

Ryan and Mr. Osborne's gardener attempting to remove him, he violently assaulted them both. Upon the same day informations were sworn by Mr. Osborne and the said Patrick Ryan, before the said Samuel Riall and W. H. Riall, local Magistrates, whereupon the said Samuel Riall and W. H. Riall committed the said John Fetherstone to Clonmel gaol, as a dangerous lunatic. The informations and commitment were as follows:—The information of Ralph Osborne, Esq.; “Saith the complainant was walking in his demesne at Newtown, in the county of Tipperary, with Sir John Keane, Bart., and others, when the defendant John Fetherstone, on being asked to leave the grounds he was trespassing on, refused, saying, at the same time, he was the lawful possessor; on assistance arriving, which I sent for, he again refused to leave the ground, and Patrick Ryan and the gardener arresting him, he violently assaulted both, and kicked Ryan in the mouth. He also threatened the complainant.” The information of Patrick Ryan—“Saith he is employed by Ralph Osborne, Esq., of Newtown, in the county of Tipperary. Saith that on this day, the 14th of January 1859, he was at his employment at Newtown above named, when Mr. Osborne called upon him to remove a man named John Fetherstone, who had come into said grounds of Newtown, and would not leave the premises when called upon so to do; that he, said Fetherstone, refused to leave, and informant then gently caught hold of him to remove him; that said Fetherstone then assaulted informant, by kicking him with the heel of his shoe in the mouth.” The commitment, dated the 14th of January 1859, was as follows:—

“ County of Tipperary, to wit.	}	“ By two or more Justices of the “ Peace, in and for the said county of Tipperary.—To the Governor of the gaol of Clonmel.—Whereas Ralph Osborne has sworn informations before us, stating facts from which it appears that John Fetherstone has been discovered and apprehended under circumstances denoting a derangement of mind, and a purpose of committing an indictable crime; that is to say, on the day he went to Newtown Anner, county of Tipperary, the property of Ralph Osborne, and claimed same as his own, and threatened to injure said Ralph Osborne, and did assault Patrick
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"Ryan and the gardener: and whereas we have called to our
 "assistance John W. Dowaley, Esq., being a legally qualified sur-
 "geon and medical doctor, and in view and examination of the said
 "John Fetherstone, and on the information of the said Ralph
 "Osborne and Patrick Ryan, we are satisfied that the said John
 "Fetherstone is a dangerous lunatic—these are, therefore, in her
 "Majesty's name, to charge and command you to receive and detain
 "in your custody, in the said gaol of Clonmel, the body of the said
 "John Fetherstone, and safely to keep, until he shall be removed
 "to the proper Lunatic Asylum, or otherwise discharged by the due
 "course of law; and for your so doing this shall be your sufficient
 "warrant and authority." The usual medical certificate accom-
 panied this order of commitment. The said John Fetherstone
 remained in Clonmel gaol until the 4th of March 1859, when he was,
 by the Lord Lieutenant's warrant, removed to the District Lunatic
 Asylum at Clonmel. The conditional orders above mentioned were
 obtained on the affidavit of George Fetherstone, the father of the
 said John Fetherstone; but, as the Court did not allow the affi-
 davits in the case to be opened, except so far as to give Mr. Osborne
 and the governor of the District Lunatic Asylum the opportunity
 of answering certain charges made against them in the affidavit of
 George Fetherstone, it is only necessary, for the purposes of this
 report, to state that portion of the affidavit of George Fetherstone
 which accounted for the delay in not sooner applying to the Court.
 He stated that, ten days after the committal of his son to gaol, he
 employed a solicitor to take the necessary proceedings to have the
 matter brought forward at the next Spring Assizes; and that, by
 the neglect of the solicitor, no proceedings were taken. That in
 April 1859, he employed another solicitor, and went to Dublin for
 the purpose, but from the expensive mode of proceeding adopted by
 him, he apprehended his inability to bear the expense of same, and
 was obliged to withdraw from him. That he then forwarded two
 memorials to the Lord Lieutenant, and, having received a reply to
 the last, which was unsatisfactory, he saw the necessity of taking
 proceedings in the Superior Courts; and that, from his close appli-
 cation to business, he was unable to employ his present solicitor

before the close of the summer. That he had done everything in his power, or that his means enabled him, to have the necessary steps taken, with as little delay as possible, to have his son's case investigated.

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Brewster (with him *R. J. Lane* and *C. Shaw*) showed cause against the conditional orders.

The conditional order for the *certiorari* is misconceived. The 8 & 9 *Vic.*, c. 107, s. 10, requires that the informations shall be returned to the Clerk of the Crown; so that this conditional order should have been upon the Clerk of the Crown of the county of Tipperary. The difficulty will be, that this is an order directed to the Justices, which they cannot obey, because they cannot remove those documents out of the custody of the Clerk of the Crown. The committal of John Fetherstone took place upon the 14th of January 1859. No application is made to the Court, for his discharge, until Michaelmas Term 1859. The certificate of the doctor, which accompanies the committal, states that Fetherstone is a lunatic, dangerous to himself and others. The affidavits of Messrs. Riall, Osborne and Sir J. Keane are only opened to refute the imputations cast upon them in the affidavit of G. Fetherstone, the father of J. Fetherstone. Now as to the sufficiency of the informations:—Under the 1 & 2 *Vic.*, c. 27, s. 1, it was not necessary that there should be any information in writing or upon oath; it would have been sufficient had the committal stated that, upon personal view by the Justices, they had been satisfied that the party was, at the time, a lunatic; and that he was apprehended under circumstances calculated to raise suspicion that he had a purpose of committing an indictable offence. That Act was altered by the 8 & 9 *Vic.*, c. 107, under which the Justices cannot commit a party unless on the oath of one or more person or persons, stating facts from which it should appear to the Justices, first, that such party was discovered and apprehended under circumstances denoting a derangement of mind; secondly, and a purpose of committing some crime for which he might be indicted; and, thirdly, that he is a dangerous lunatic. The word "denoting" must be read as governing the entire sentence thus,

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the person must be discovered and apprehended under circumstances *denoting* a derangement of mind, and *denoting* a purpose of committing a crime, &c., and *denoting* that he is a dangerous lunatic. The question then is, do these informations comply with the statute, and state facts which denote these three things? As to whether the facts disclosed by these informations denote a derangement of mind, that is a question for the Justices, and the Court will give credit to their discernment and *bona fides*. The fact that a man believes he is, and claims to be, the lawful possessor of another man's property, clearly denotes a derangement of mind. Then that he had a purpose of committing an indictable offence, his violent assault upon Patrick Ryan sufficiently denotes that; and that he is a dangerous lunatic, it is expressly stated in Mr. Osborne's information, that J. Fetherstone threatened him. These informations, therefore, are quite in accordance with the statute. Again, a commitment, as this is, for safe custody, to prevent the person doing mischief to others, is not construed so strictly as a conviction or commitment in execution would be: *The King v. Gourlay* (a). The 8 & 9 Vic. c. 107, is cumulative, rendering something more necessary to be done than was required by the 1 & 2 Vic. c. 27, which, however, still remains in full force. The two statutes are, therefore, to be read together; and, as these informations sufficiently comply with their requirements, the Court will not be astute to find defects in them, and thereby deprive all the Queen's subjects of the protection intended to be afforded them by those statutes. As to the conditional order for the *habeas corpus*; if the Court be satisfied that this person is now a dangerous lunatic, the Court will not order him to be brought up: *Rex v. Clarke* (b). The Lord Lieutenant's warrant, transferring J. Fetherstone from gaol to the Lunatic Asylum, is dated the 4th of March 1859. Applications were made to the Lord Lieutenant for his discharge; but medical men having examined him, and being of opinion that he should not be allowed to go at large, these applications were unsuccessful; and, under these circumstances, the Court will hesitate before it order this person to be brought up to be discharged.

(a) 7 B. & C. 669.

(b) 3 Burr. 1362.

Whiteside (with him *T. Harris*), for the conditional order.

The informations are bad in point of law, as is also the order of commitment. The 1 & 2 *Vic.*, c. 27, did not require any information upon oath; but the Magistrates, having got a doctor's certificate, could commit upon their own view of the person alleged to be a lunatic. Then came the 8 & 9 *Vic.*, c. 107, which is a negative statute, and prohibits the committal of any person as a lunatic, unless there appear upon oath facts, first, denoting a derangement of mind; secondly, a purpose of committing some crime for which, if committed, such person would be liable to be indicted; and, thirdly, that such person is a dangerous lunatic. The person must be a dangerous lunatic; and the instances given by Lord Tenterden, in *The King v. Goulay* (a), show what acts he considered as indicating that a man was a dangerous lunatic. The Court can only ascertain from the informations whether there are facts disclosed which warrant the Magistrates in committing under these statutes. The person, at the time of his committal, must be shown to be a dangerous lunatic; for example, if he have supplied himself with arms for the purpose of committing some crime; he must have the purpose in his mind, and, unless that be shown, he cannot be committed as a dangerous lunatic. Nor is this all; for not only must it be shown that he has a purpose of committing an indictable offence, and that he is a dangerous lunatic, but there must also appear facts denoting a derangement of mind. There is no affidavit from the doctor, there is merely his certificate as to the state of this man's mind; that is not sufficient; at all events, it should state the facts upon which he formed his opinion: *In re Fell* (b), which was a decision upon the 8 & 9 *Vic.*, c. 100, s. 46, the English Act: *Shelf. Lun.*, p. 670. The case of *The King v. Goulay* (c) is distinguishable from the present case. That case was decided upon the 39 & 40 *G.* 3, c. 94, s. 3, which was very different from the 8 & 9 *Vic.*, c. 107, because, under the earlier Act, the Justice, if he thought fit, might commit the person brought before him as a dangerous person suspected to be insane; whereas, under the

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(a) *Supra.*

(b) 3 D. & L. 381, 384.

(c) *Supra.*

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latter Act, the Justice cannot commit unless upon information upon oath. It is said that threats have been uttered and letters written by J. Fetherstone; but it is not stated what those threats are, nor are any of the letters set out, as they should have been: *The Queen v. Dunn (a)*.

The meaning of the 8 & 9 Vic., c. 107, is, that the person had a previous purpose in his mind, of committing some indictable offence. The fact of this man refusing to leave the ground, and saying he was the owner of the property, does not make him a dangerous lunatic. The Legislature has purposely used the word "dangerous," to shut out the case of a person labouring under a delusion. All that appears from the informations is, that this man was found walking in the demesne of Mr. Osborne, that he refused to leave, and that, in making him do so, a scuffle ensued. As to the order of commitment, when a statute requires that there shall be informations, the order of commitment must be in conformity with the informations. The Court cannot look beside the informations; and as the jurisdiction of the Magistrates is derived from, and rests solely upon, their complying with the requirements of this Act of Parliament, unless the informations disclose facts showing the existence of the three things required by the Act, they have no power to commit this man as a dangerous lunatic.

Lawson (with him *C. R. Barry*), for the Crown, suggested that as John Fethersone was in custody in the Lunatic Asylum, under the warrant of the Lord Lieutenant, and as a mode was pointed out by the Act by which he could obtain his discharge, before the Court was called upon to grant the *habeas corpus* the usual course was, to have an investigation into the state of mind of the person in custody: *Rex v. Turlington (b)*; *Ex p. Carpenter (c)*.

T. Harris, with *Whiteside*.

The warrant of the Lord Lieutenant being founded upon the order of commitment, if that be bad the warrant must also fall

(a) 12 Ad. & El. 559.

(b) 2 Burr. 1115.

(c) Sm. & Bat. 81, 82.

to the ground; and it is the province of this Court, if it find a person in illegal custody, or that he has been removed to another custody, to grant the *habeas corpus*. Then, as to the *certiorari*, the requisites of the 8 & 9 *Vic.*, c. 107, mentioned by Mr. *Whitside*, must be strictly complied with. The question is not whether this man is now a lunatic, but whether he is a dangerous lunatic.—

[LEFROY, C. J. Supposing that, at the time the conditional order was obtained, he was not a dangerous lunatic, yet, if he be so now, we will not grant the *habeas corpus* to bring him up to be discharged, because the Magistrates could immediately re-commit him. Where it is incumbent that the Court should be informed of the state of a man's mind, it never acts until his state of mind is ascertained. As to the part of your motion, therefore, which relates to the *habeas corpus*, perhaps the most satisfactory course would be to let it stand over until the state of this man's mind be ascertained by the examination of two medical men, one to be named by you, and the other to be named by the Crown].—There can be no objection to that, according to the cases cited by Mr. *Lawson*; but the examination should be confined to the ascertaining whether this man is a dangerous lunatic; for the statute does not authorise his being kept in confinement unless he be a dangerous lunatic.—

[LEFROY, C. J. I think that the object of the examination should be to ascertain whether the man is a dangerous lunatic, or merely labouring under a harmless delusion; and for that purpose we will direct all the information that can be given by the officers of the Lunatic Asylum (who must be presumed to be the persons best qualified to know all about him) to be afforded to the medical men, to assist them in forming their opinion as to his state of mind. It would also be desirable that a medical man who attended him, or on a former occasion examined him, should be associated with the medical men who are to make this examination, as he must be supposed (assuming he is a competent person) to be better able to judge of his state of mind than a stranger could be.]—There can be no objection, provided he be a person not influenced by local prejudices.—[LEFROY, C. J. Now as to the part of the motion which relates to the *certiorari*, it seems to us that there is this

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difficulty in your way, what *locus standi* has the present applicant?—He appears as the father and next friend of his son, who, being confined in a Lunatic Asylum, is rendered incapable of applying himself.—[LEFROY, C. J. The Court will entertain the application of a father, or even of a stranger, to enable a person in custody to assert his liberty and his right to a writ of *habeas corpus*, but it is otherwise in the case of a *certiorari*.]—Not when the object of the *certiorari* is to procure the discharge of the party from custody. As to the delay in applying to the Court; John Fetherstone was removed to the Lunatic Asylum under the Lord Lieutenant's warrant of the 4th of March; therefore, the jurisdiction of the Judge of Assize and the Chairman of Quarter Sessions ceased; and the affidavit of his father, G. Fetherstone, shows that he used all the means in his power to obtain the liberation of his son, before applying to this Court.

Lane and *C. Shaw*, in reply.

Assuming that the conditional order for the *certiorari* is properly directed to the Justices, it would be of no use, the commitment being now spent; for it requires the governor of the gaol to keep him in safe custody until he is removed to the proper Lunatic Asylum, or otherwise discharged in due course of law; he has been removed to the proper Lunatic Asylum, where he is now detained under the Lord Lieutenant's warrant, and from which custody the Act points out the mode of his obtaining his discharge. But all that is sought by the *certiorari* will be obtained upon the motion for the *habeas corpus*, when all these documents will be brought before the Court; indeed, *habeas corpus* is the proper mode of proceeding: *The King v. Bowen* (a); *Grady & Scotland, Cr. Prac.*, p. 137. But further, the applicant is precluded by his own laches and delay from obtaining the *certiorari*; a writ, the granting of which being in the discretion of the Court, although delay alone may not be a ground for refusing it, yet it is an element which influences the Court in exercising its discretion. In the case of *Regina v. the Commissioners of the Tower Hamlets* (b), the *certiorari* was refused, on the ground

(a) 5 T. R. 156, 158.

(b) 7 Jur., 769.

of delay. Here, Fetherstone was committed on the 14th of January; his case might have been brought forward at the ensuing Spring Assizes; then follow the Quarter Sessions, then the Summer Assizes, then another Quarter Sessions; and yet the first application to this Court is not made until November last. This application, too, is not made by the party interested, but by a stranger; and although the Court will grant a *habeas corpus* on the application of any one, there is no instance of their granting a *certiorari* on such an application as this.

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LEFROY, C. J.

This case comes before the Court upon a conditional order for a writ of *habeas corpus*, to have John Fetherstone brought up, and discharged from the custody of the keeper of the Clonmel District Lunatic Asylum; and also upon a conditional order to remove into this Court the informations, warrants and orders made by two of the Justices of the county of Tipperary, under which the said John Fetherstone was, in the first instance, committed to gaol, and from whence he was removed to the Lunatic Asylum, in order to have them quashed. The order upon which the said John Fetherstone was originally committed was an order made by two Magistrates, grounded upon two Acts of Parliament, the 1 & 2 Vic., c. 27, and the 8 & 9 Vic., c. 107. We are clearly of opinion that, taking the provisions of both these Acts together, a valid order of committal cannot be made, unless there appear, upon the face of the information upon which that order is founded, facts sufficient to show that the three things mentioned in the statutes concur. These three things are, first, that the person should be discovered and apprehended under circumstances denoting a derangement of mind; secondly, with a purpose of committing some crime for which, if committed, such person would be liable to be indicted; and, thirdly, that such person is a dangerous lunatic. It is not enough that there should appear on the face of the information matters from which, by possibility, the case might be one coming within the Acts. The grounds must be shown, establishing these several requirements, as facts. The amendment introduced by the latter

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Act was introduced purposely, in order to protect the subjects of the realm from the danger to which they were exposed under the former statute; which was this, that a person might have been taken up and committed to gaol, or to a lunatic asylum, and there, perhaps, imprisoned for life, without knowing, or having an opportunity of knowing, the grounds upon which that order of commitment was made. The amendment introduced by the latter Act made a proper and rational provision to guard against this, which appears to have been an intolerable grievance—a vast public mischief, most dangerous to the liberty of the Queen's subjects. In this case, we are clearly of opinion that there does not appear upon the face of these informations, on which the order of committal has been grounded, sufficient to satisfy us that the requisitions of the statutes have been complied with; and, therefore, did the case turn simply and merely upon the validity of this committal, we should be of opinion that we could not detain this person in custody, under an order of committal founded upon such informations. But the application to the Court to grant a *certiorari*, for the purpose of quashing these proceedings, is not a matter of course. When, however, the liberty of the person is involved, and when it is necessary that the proceedings in the Court below should be brought up, in order that, if the Court be of opinion that the person is detained illegally, they may be quashed, and the person discharged from that illegal custody, in such case the Court will allow the writ of *certiorari* to issue. Here, however, no such necessity exists; indeed it is not the proper course, according to the opinion of Lord Kenyon, in the case of *Rez v. Bowen* (a), already cited, in which he says that, where an order of Sessions involves the liberty of the party, the proper mode of obtaining relief is, not to apply for a *certiorari* to remove the order of Sessions, for the purpose of quashing it, but for a *habeas corpus*, “on a return to which the cause “of commitment would be specified; and upon those the Court “would be enabled to form an opinion whether or not those “causes were sufficient to justify his detention.” In that case,

(a) 5 T. R. 156, 158.

although Lord Kenyon did permit the question of the granting the *certiorari* to be argued, yet his opinion clearly was, that the proper course of proceeding was by writ of *habeas corpus*, upon the return to which the several documents in the case would necessarily be brought before the Court. Besides this, there are other grounds upon which the *certiorari* must be refused. The person on whose behalf this application is made is now in custody in the Lunatic Asylum, under the warrant of the Lord Lieutenant; but he is entitled to his liberty under the latter Act of Parliament, upon its being certified to the Lord Lieutenant, by two physicians or surgeons, or a surgeon and physician, that he has become of sound mind, or has ceased to be, or is not, a dangerous lunatic. It is unnecessary for him, therefore, to pursue any other remedy. He is entitled to and must obtain his liberty, if it be so certified that he is of sound mind, and is not a dangerous lunatic. The Court might again stop here, and upon this ground refuse to grant the *certiorari*; but there is another ground, namely, that the application for the *certiorari* is made by a person who has no *locus standi* in this Court for that purpose. Whatever may have been done upon an application for a *habeas corpus* on behalf of a lunatic, we have never known that principle to have been extended so as to allow a person to apply on behalf of another for a writ of *certiorari*. Another reason why we should refuse to grant the writ of *certiorari* in this case is the delay, and the repeated opportunities which the party has had of getting rid of what now appears to be an order of commitment founded upon illegal informations. The case was duly returned at the Assizes for the county in which the commitment took place; and, of course, the name of the party, so committed and being in gaol, must have appeared in the Judge's calendar at the first Assizes after such commitment. The party in custody then had an opportunity of questioning the legality of this commitment, and, upon showing its illegality, might have obtained his discharge; nay, it would be the duty of the Judge to discharge him. In addition to this, application might have been made at the very next Quarter Sessions. The Summer Assizes come round, and we find him still

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H. T. 1860. remaining in gaol under the original order of commitment; again
Queen's Bench his name appears in the Judge's calendar, and another opportunity
THE QUEEN occurred of applying for his discharge. Another Quarter Sessions
v. took place, and again he might have applied for his discharge.
RIALL. This opportunity is also allowed to pass; and the first application
to this Court is made in November last. Now what takes place
in the meantime? The original order of commitment is allowed to
stand as valid and unquestioned; the Lord Lieutenant then, in the
discharge of his duty, and in order to relieve this person from the
pressure of imprisonment in the county gaol, exercises the authority
given him by the Act of Parliament (a), and directs his removal to
the District Lunatic Asylum. During all this time no application is
made by or on behalf of this person to any of the tribunals to which
he had access, and from which he might have obtained redress.
This illegal order of commitment having thus been allowed to stand
unimpeached, we are now asked to grant a *certiorari* to quash that
order, for the purpose of establishing that the Lord Lieutenant has
illegally issued his warrant, directing the removal of this man to
the District Lunatic Asylum. If a party be entitled to a *certiorari*
upon other grounds, I am not prepared to say that delay in apply-
ing for it would, *per se*, be sufficient to prevent his obtaining it,
although it has been made a ground of refusal in some cases,
and, in the present case, is an important circumstance to be consi-
dered. This disposes of the question with respect to the *certiorari*.
Although we do not at all make anything that appears upon the
affidavits the foundation of our judgment, yet sufficient appears to
show that the Magistrates have exercised their jurisdiction defecti-
vely and carelessly. As we are of opinion, therefore, that the
Magistrates have not discharged the duty cast upon them by the
Act of Parliament (b), with that diligence which they should have
used, and as that has laid the foundation for the party coming
here, we shall not give them any costs. With respect to the
habeas corpus, we have made a provision which, I now hope, will
be satisfactory to all parties. The medical gentlemen who have
been selected, having inquired into the condition of this person,

(a) 1 & 2 Vic., c. 57.

(b) 8 & 9 Vic., c. 107.

will report to us whether he be a dangerous lunatic, or merely labouring under a harmless derangement of mind.

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O'BRIEN, J.

I concur in the judgment pronounced by my LORD CHIEF JUSTICE. I shall not enter in detail into the various grounds upon which these informations have been quarrelled with. It is enough to compare them with the Act of Parliament, to see that they are quite insufficient. They do not contain any statement that this man is a lunatic, except that he claims property to which he has no right. I also concur, for the reasons stated by my LORD CHIEF JUSTICE, that the *certiorari* should not be granted, it being a matter of discretion with the Court, and not being necessary under the circumstances of this case. With regard to the costs, it is right that the Magistrates should be taught that this Act of Parliament was enacted with the view that, upon the face of the documents upon which the Magistrates act, there should appear a sufficient case for detaining a party in custody. The Act of Parliament provides that certain requisites should be contained in the information. In our opinion, these informations do not contain those requisites. The Magistrates, therefore, must bear the costs of not having attended to their duty, when they had before them ample materials to enable them to make their order of commitment in accordance with the Act of Parliament.

HAYES, J.

Having been engaged, during the greater portion of the argument, elsewhere, I take no part in this decision.

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In the Matter of
 The Appeal of HARLOE TRUMBLE PHIBBS

v.

The Admission of JOHN KEARNS and MICHAEL GILLIN
 on the Burgess-roll of the Borough of Sligo.*

Jan. 28.

A person claiming to be enrolled as a burgess cannot add, to the net annual value at which the premises occupied by him are rated, a sum for land-lord's repairs and insurance, so as to make up the amount of qualification required by the 3 & 4 Vic., c. 108, s. 30, unless such sum be stated in the rate; and, therefore, a custom in a borough of allowing a fixed sum for land-lord's repairs and insurance, the same not being stated in the rate, is bad.

A CONDITIONAL order had been obtained on the 12th of November 1859, by which it was ordered that the name of each of them, the said John Kearns and Michael Gillin, be erased from the burgess-roll of the borough of Sligo, on the grounds that the said John Kearns and Michael Gillin, or either of them, did not, on the 10th of November 1859, and for twelve calendar months prior to the 31st of August 1859, occupy within said borough of Sligo any house, warehouse, counting-house or shop, which, either separately or jointly with any land within said borough occupied therewith by him as tenant, or as owner, was of the yearly value of not less than £10, as by the statute in that behalf required. It appeared from the affidavit of the appellant that, at a Court of Revision for the borough of Sligo, held by the Mayor and Assessors, on the 7th, 8th, 9th and 10th of November 1859, the appellant objected to the names of the said John Kearns and Michael Gillin being enrolled on the burgess-roll, on the ground that they did not occupy premises within the borough rated as required by 3 & 4 Vic., c. 108, s. 30. That John Kearns was rated as the occupier of premises of the value of £9. 15s., and that Michael Gillin was rated as the occupier of premises of the value of £9. That, notwithstanding the objection of the appellant, the Mayor and one of the Assessors admitted and enrolled the said John Kearns and Michael Gillin as burgesses. From the affidavits filed as cause, it appeared that John Kearns claimed, in addition to the annual rating of £9. 15s., to be entitled

* *Coram* LEFROY, C. J., and O'BRIEN, J.

to add to his rating the further sum of £1, for landlord's repairs and insurance; and that Michael Gillin, in addition to the annual rating of £9, claimed to be entitled to add the like sum for landlord's repairs and insurance. The Town-clerk, in his affidavit, stated that, at all the annual revisions from the time of his appointment in 1849, the name of every inhabitant householder rated to the sum of £9 or upwards was admitted on the burgess-roll, all the other requirements of the Act being satisfied. That in his annual inspection of the rate-books of the union in which the borough is situate, he had never seen any sum or any column purporting to set forth a sum equal to or for "landlord's repairs and insurances." That it has been the invariable usage and custom at all the revisions of the lists to allow the sum of £1 for landlord's repairs and insurances to be added to the rating of £9 and upwards, for granting the municipal franchise in said borough.

The question in both cases being similar, it was arranged that the decision in *Kearns' case* should rule both the cases.

Sir C. O'Loghlen (with him *Harkan*) showed cause.

The question is, whether the custom which prevails in this, as in many other boroughs, of allowing every inhabitant householder to add an uniform sum of £1 to the net annual value at which his premises are rated, so as to make up the amount required by the Act to entitle him to be enrolled as a burgess, is in accordance with section 30 of 3 & 4 *Vic.*, c. 108? By that section, "Every inhabitant householder shall be entitled to be enrolled as a burgess, who shall occupy within such borough any house, warehouse, &c., which, either jointly or separately with any land within such borough occupied therewith by him as tenant, or occupied there-with by him as owner, shall be of the yearly value of not less than ten pounds, to be ascertained and determined in manner following, and not otherwise; that is to say, such value shall be a sum composed of the net annual value at which the premises so occupied by such man shall be rated (as they are hereby required to be) to the relief of the poor, &c., and of the amount

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H. T. 1860. "of the sums at which the landlord's repairs and the landlord's insurance shall be estimated and *stated* in any rate to be made "in pursuance" of the Poor-law Act. Now, although the Act requires that the sum for landlord's repairs and insurance shall be *stated* in the rate, which, as appears from the affidavit of the Town-clerk, has not been done in this case, yet, as Kearns has complied with all the requirements of the Act, and as the Town-clerk in his affidavit establishes the existence of this custom since 1849, and as there is no evidence to show that it may not have existed long previously to that year, the Court will not deprive this person of his franchise, in consequence of the neglect of an official under the Poor-law, over whom Kearns had no control.—[LEFROY, C. J. Is there not a form prescribed by the Poor-law Commissioners, in which the rate in boroughs is to be made? and if this rate be not in accordance with that form, Kearns has his remedy by applying to have the form made conformable with that prescribed by the Commissioners. Now the Act says that the amount for landlord's repairs and insurance are only to be added when *stated* in the rate. That has not been done here; and as without this addition the party has not the qualification required by the Act, how can we say that he is qualified to be enrolled as a burgess?—The appeal in the present case is brought under sections 9 and 50 of the 3 & 4 *Vis.*, c. 108; and being a species of statutable *quo warranto*, *The Queen v. Reynolds* (a), it is discretionary with the Court to entertain it or not: *The King v. Parry* (b); and as the Act is directory, not mandatory, this a case in which the Court will exercise its discretion so as not to deprive a party of his franchise.—[LEFROY, C. J. There are, no doubt, cases in which the Court may see fit to exercise the discretion vested in it, but it can never exercise that discretion so as to dispense with the requirements of an Act of Parliament.]

Macdonogh (with him *C. H. Hemphill*), contra, were not called upon.

(a) 1 Ir. Com. Law Rep. 157, 168.

(b) 6 Ad. & El. 810.

Harkan, in reply.

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The custom adopted in this, and, as was stated in the arguments, in other boroughs, of allowing a fixed sum for landlord's repairs and insurance, although not stated in the rate, is directly opposed to the Act of Parliament, and to sanction it would be to render inoperative this provision of the statute; the conditional order must, therefore, be made absolute.

O'BRIEN, J., concurred.

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Common Pleas.

In re DARCY'S Infants.

(*Common Pleas.*)

Nov. 13, 17.

The statute 14 and 15 Car. 2, c. 19, s. 6 (*Ir.*), which provides for the appointment of testamentary guardians, applies only to legitimate children; and, therefore, where a marriage ceremony had been celebrated by a Roman Catholic priest, between a man a Roman Catholic, and a woman who had, previously to the ceremony, conformed to and professed the Protestant religion (although it was alleged that she had stated before the marriage that she was a Roman Catholic), and the parties had lived together as man and wife, and were the father and mother of children, for whom the father had appointed guardians in his will:—*Held*, that the marriage being void (under the provisions of 19 G. 3, c. 13 (*Ir.*), the appointment of testamentary guardians was ineffectual.

Held also, that the evidence of the mother, as to the illegality of the marriage, in a proceeding in reference to the *status* of the children, was admissible; that she was not estopped from giving such evidence; and that the presumption arising from the facts of marriage, cohabitation, and reputation, was not sufficient in the present case to rebut such proof.

Quere—As to the effect of such a presumption in a proceeding between the reputed husband and wife, in reference to the validity of the marriage, *inter se*?

The mother is entitled to the guardianship of her illegitimate children.

THIS was an application for a writ of *habeas corpus*, made by certain persons named in the will of one Patrick Darcy, as testamentary guardians to his children, for the purpose of bringing up the bodies of the latter, being infants under age, that they might be placed under legal custody, according to the provisions of 14 & 15 Car. 2, c. 19, s. 6 (*Ir.*) The motion was resisted, upon the ground that the testator, and the mother of the children in question, had not been legally married; the marriage ceremony having been performed by a Roman Catholic priest between the testator, who was a Roman Catholic, and his alleged wife, who had, previous to the ceremony, professed herself to be a member of the Established Church.

A conditional order had been made by Mr. Justice Fitzgerald, in Chamber, upon the 5th of October 1860, that a writ of *habeas corpus* should issue, commanding Josias Smyly, Esq., Joseph Kincaid, Esq., and Frances Darcy, to bring up the bodies of Teresa Darcy, Frances Darcy, Honora Darcy, John Darcy and George Darcy, infants, before the Judges of the Court of Common Pleas.—[The facts contained in the affidavits, used both upon the original motion and the argument of the case, will appear fully in the judgment of the Court].

Brereton showed cause.

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J. O'Hagan and *P. White*, in support of the conditional order.

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Purcell was heard in reply.

The following authorities were referred to:—*Piers v. Piers* (a); *Peckham v. Peckham* (b); *Barry v. Barry* (c); *Ward v. St. Paul* (d); *Rex v. Delaval* (e); *Regina v. Orgil* (f); *Rex v. Hanley* (g); *Ex parte Glover* (h); *Mace v. Caddell* (i); *Stedman v. Powell* (k); *In re Anne Knee* (l); *Kirwan v. Kirwan* (m); *Bell v. Graham* (n); *Com. Dig.*, tit. *Guardian*; *Chambers on Infancy*, p. 95; 10 G. 4, c. 7, s. 10; 30 G. 3, c. 29, s. 1 (*Ir.*); 19 G. 2, c. 13 (*Ir.*); 14 & 15 Car. 2, c. 19 (*Ir.*).

Cur. ad. vult.

MONAHAN, C. J., delivered the judgment of the Court.

Nov. 17.

This case comes before the Court upon cause shown on behalf of Frances Darcy otherwise Ringsbury, against a conditional order made by Mr. Justice Fitzgerald, that a writ of *habeas corpus* should issue, for the purpose of bringing before the Court the bodies of five children, all under twenty-one years of age, named Honora Darcy, Teresa Darcy, John Darcy, George Darcy and Frances Darcy. It appears, upon the affidavits in this matter, that these children are respectively of the ages of fifteen, thirteen, ten, seven and five years. The application for the writ of *habeas corpus* has been made on behalf of the Rev. Mr. Kearney, a Roman Catholic priest, and the Hon. Lady Catherine Petre; and it was grounded upon the affidavit of the Rev. Mr. Kearney, which

(a) 2 H. L. Cas. 331.

(b) 2 Cox., C. C., 46.

(c) 1 Moll. 210.

(d) 2 Bro., C. C., 583.

(e) 3 Burr. 1436.

(f) 9 Car. & Pay. 80.

(g) 9 Car. & Pay. 80, note.

(h) 4 Dowl., P. C., 291.

(i) 1 Cowp. 233.

(k) 1 Adams, 65.

(l) 1 Bos. & Pul., N. R., 149.

(m) Batt. 712.

(n) 1 Law Times, N. S., 221.

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states that Patrick Darcy, the father of these children, died on or about the 14th of June 1860, leaving his widow Frances Darcy and these five children surviving. That, on the 28th of May, in the same year, he made his will, leaving all the property he might be possessed of to his wife, Frances Darcy, for the benefit of his five children, and desired that they should be brought up in the Roman Catholic religion, of which he was a member; and thereby appointed the Rev. Patrick Kearney and the Hon. Lady Catherine Petre guardians of his children. The case made by the Rev. Mr. Kearney, in support of the application, was, that he did not interfere with the mother's custody of these children, until he had ascertained that she, in violation of the injunction and direction contained in the will of her husband, was bringing up these children as members of the Established Church. He also states "that said children had been all brought up, in their father's lifetime, in the Roman Catholic religion, and, during his lifetime, uniformly practised that religion." That the three girls are now in a public institution in the town of Kingstown, for the purpose of being brought up members of the Established Church. Upon these grounds, he applied for the writ of *habeas corpus*, stating that he and Lady Catherine Petre were the testamentary guardians, and, as such, legally entitled to the custody, of these children. There is no allegation in these affidavits that any of these children (the eldest being only fifteen years of age) is retained in Kingstown institution against their will, or that there is any duress in the case. The grounds of the application are simply that Mr. Kearney and Lady Catherine Petre are the testamentary guardians of these children; and there can be no doubt that, upon the affidavits upon which the conditional order was granted, a proper case for the issuing of the writ was made out. In reply to this affidavit of the Rev. Mr. Kearney, an affidavit has been made by the mother of these children; and she states upon her oath that she was not the wife of Patrick Darcy, deceased, having never been legally married to him, the only marriage between them having been solemnised by a Roman Catholic priest; that she was at all times a member of the Established Church; that she was the child of Protestant parents; that she was baptised &

Protestant (referring to the date of her baptism), and that she was also confirmed as such by the Archbishop of Dublin; that she, at all times, professed the Protestant faith, and attended Divine Worship in the church of the parish in which she resided; and that she not only attended Divine Service, but also was a participator in the Sacrament, as a member of the Established Church. Under these circumstances, being the mother of these children, she submits that the custody of them should not be taken from her. She also says that it is not true that they were always brought up in the Roman Catholic faith, as stated by Mr. Kearney in his affidavit; but that, to the best of her ability and means, she brought them up as members of the Protestant faith, but that the two eldest of them, for some time in the lifetime of their father, attended the Roman Catholic chapel, at the instance of Lady Catherine Petre, but that this was contrary to the wish of the children themselves. This was the original affidavit of the mother of the children.

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The Rev. Mr. Kearney made a further affidavit, in which he stated, in effect, that it is untrue that the mother never professed herself to be of the Roman Catholic religion; because that, on the day of her marriage by him, she professed herself to be a Roman Catholic; and that she attended confession as a Roman Catholic; and that all her children were baptised as Roman Catholics. She, on the other hand, states, in reply, that it is untrue that she professed herself to be a Roman Catholic, as stated by Mr. Kearney; that, on the contrary, her husband was well aware that she was a Protestant; and that, before the marriage, he told her that Mr. Kearney had an objection to celebrate the marriage ceremony, on account of the fact of her being a Protestant; but that, having been informed by her husband that they intended to go to Dublin, for the purpose of being married there, he consented to perform the ceremony. She states, further, that she and her husband went to the house of Mr. Kearney, about six o'clock in the evening; that they were shown into the parlour, and that the marriage was then and there celebrated according to the rites of the Roman Catholic Church; but that it is untrue, as stated

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by the Rev. Mr. Kearney, that she, on that occasion, or any other, went to confession, or that she ever, upon any occasion, entered a Roman Catholic chapel; and she asserts that she always professed herself to be a member of the Established Church; and that, on the Sunday preceding the celebration of the marriage, she attended Divine Service in the parish church, and had frequently been a participator in the Communion during that year. In addition to her affidavit, there is the affidavit of the Protestant clergyman, who states that he has been for twenty-two years the officiating minister of the parish in which the Darcys resided, and that during that time (which comprised a period of three years before the marriage) the mother of the children was a regular attendant at his church; that he considered her to be a member of his church, and that she participated in some of its rites and ceremonies. He also states that he never had any reason to suppose that she was a member of the Roman Catholic Church. There is also the affidavit of a person named Dobson, who states that he has been well acquainted with Mrs. Darcy, before her marriage, and since; that he himself is a member of the Established Church, and that, while she was in the service of Lord Wicklow, at Shelton Abbey, during the year before her marriage, and the year of her marriage, she was in the habit of attending Divine Service in the parish church; that he constantly met her on her way to church, and went with her there, and that she participated in the several services of the church. There is no allegation that any ceremony of marriage was ever celebrated between the parties, save that by Mr. Kearney. Now the question is, what order should we make upon these affidavits?

Upon these affidavits, the case made by the mother of these children is shortly this:—that the Act of Charles the Second, which authorises a father to appoint guardians, either by deed or will, for his children, applies only to the case of *legitimate*, and does not apply to the case of illegitimate, children. The words of the Act are as follows—14 & 15 *Car.* 2, c. 19, s. 6 (*Ir.*)—[His Lordship read the section.]*—Now it was scarcely argued on behalf of Mr. Kearney

* See next page.

and Lady Catherine Petre, having regard to the cases which have been decided on this Act of Parliament, that it could now be held that it applies to the case of open and notorious illegitimacy. The cases are numerous in which it has been held that this statute applies only to legitimate children. Some of them are—*Barry v. Barry* (a); *Ward v. St. Paul* (b); *Peckham v. Peckham* (c); *Ex parte Glover* (d); *Com. Dig., Guardian*. Whatever doubt or controversy, therefore, there might have been, at the time of the passing of this Act of Parliament, and however open it might have been to contend that, if the father of illegitimate children had, if I may use the expression, adopted them, and recognised and treated them as his own children, and had designated them, as the testator has done in this case by devising to them property, by the description of his children, that the statute enabling him to appoint guardians applied to such a case; it appears to us that it would be now impossible for us, in an interlocutory proceeding of this description, from which there is no appeal, to hold that the statute applied to the case of ille-

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(a) 1 Moll. 210.

(b) 2 Bro., C. C., 583.

(c) 2 Cox, 46.

(d) 4 Dowl. P. C., 291.

NOTE.—“And be it further enacted, by the authority aforesaid, that when any person or persons hath, or shall have, any child, or children, under the age of twenty-one years, and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at the time *in ventre sa mere*, or whether such father be within the age of twenty-one years, or of full age, by his deed, executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons in possession or remainder, other than persons not of the communion of the Church of England as aforesaid, and that such disposition of the custody of such child or children, made since the 29th day of October 1641, or hereafter to be made, shall be good and effectual against all and every person or persons claiming the custody and tuition of such child or children, as guardians in socage or otherwise; and that such person or persons, to whom the custody of such child or children hath been, or shall be, so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass, against any person or persons who shall wrongfully take away or detain such child, for the recovery of such child or children, and shall and may recover damages for the same in the said action, for the use and benefit of such child or children.”

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gitimate children; and, therefore, we must hold, in accordance with the authorities to which I have referred, that it applies only to the case of legitimate children. The next question is, whether this rule only applies to cases in which there has been no marriage *at all*, or to cases such as the present, in which there has been a species of marriage ceremony, and in which the parties have lived together as man and wife, and in which the man has treated and described the mother of the children as his wife in his will? It appears to us that this question must depend on the construction of the Irish statute, viz. 19 G. 2, c. 13 (*Ir.*), by which it is provided, "That every marriage which shall be celebrated after the 1st day of May which shall be in the year of our Lord 1746, between a Papist and any person who hath been, or hath professed himself or herself to be, a Protestant at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest, shall be, and is hereby declared, absolutely null and void, to all intents and purposes, without any process, judgment or sentence of law whatever." It is, therefore, impossible for us to hold, if the mother of these children states what is true, that this marriage is not absolutely null and void; and, further, assuming all that the Rev. Mr. Kearney has sworn to be true, still if we believe the remainder of the evidence, and the affidavit of the Protestant clergyman, and that of the man Dobson, there can be no doubt that, although for the purpose of inducing Mr. Kearney to perform the ceremony, she may have stated to him that she was a Roman Catholic, still, if, within the year preceding that marriage, she regularly attended the Protestant church, and participated in the Sacrament there, and professed herself to be a Protestant, there can be no doubt that the marriage was absolutely null and void.

The case of *Kirwan v. Kirwan* (a) clearly shows how the law is on the subject. That was an ejectment upon the title, brought by a remainderman, who alleged that the previous tenant for life had died without issue. The defendant, on the other hand, alleged that he was the son of the deceased tenant for life, his father and mother having been regularly married according to the rites of the

(a) Batt. 712.

Established Church. The plaintiff's case was, that the marriage was null and void, the defendant's father having been previously, namely in the year 1811, married to a woman of the name of Celia Hopkins, who was still alive; and the real question in the case was, whether the marriage of defendant's father with Celia Hopkins was a valid marriage, or merely null and void, having been celebrated by a Roman Catholic priest? and on this depended the legitimacy or illegitimacy of the defendant. The case was tried in the county of Galway, before Judge Vandeleur. It appeared that Celia Hopkins was, at all times, a Roman Catholic. It appeared that defendant's father had been originally a Roman Catholic, his mother having been a Roman Catholic, and that he was baptised by a Roman Catholic priest; and evidence was given, on behalf of the plaintiff, that he continued a Roman Catholic, up to and for a considerable time after his marriage with Celia Hopkins; and one witness stated that he received the Sacrament according to the rites of the Roman Catholic Church, on the day of his marriage with Celia Hopkins. There was, however, a great body of evidence on the part of the defendant, to the effect that, for some years previous to his marriage with Celia Hopkins, Mr. Kirwan was a constant attendant at the Protestant church, and stated himself to be a Protestant. The evidence is given in detail in pp. 714, 715 of the report. It is not necessary for me to state it on this occasion, as my object is merely to show what was in that case decided to be the construction of the statute to which I have referred. The learned Judge, in his charge to the jury, informed them that, though Edward Kirwan had been originally a Roman Catholic, still, if he professed himself to be a Protestant, in the twelve months before his marriage with Celia Hopkins, that that marriage was void, though he had not conformed to the Protestant religion, as pointed out by the statutes on the subject; but that such profession must be an unequivocal one, such as receiving the Sacrament, or attending the religious rites of the Protestant Church, or performing acts of religious duty such as a Roman Catholic would not do. Exceptions were taken to this part of the learned Judge's charge; and the jury having found the marriage between Edward Kirwan and Celia Hopkins to have

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been null and void, the exceptions were argued in the Court of Queen's Bench, which Court decided that the Judge's charge was quite correct. We, sitting here in a proceeding such as this, have no power to review the decision of the Queen's Bench in that case; and, without doing so, how can we, if we give any credit to the affidavit of the mother of the children, corroborated as it has been by the affidavit of the Protestant clergyman and Dobson, decide that their children are legitimate, and, therefore, within the provision of the statute enabling their father to appoint a guardian for them? But as I understood Mr. *O'Hagan's* argument, what he mainly relied on was not that the facts I have stated, if regularly proved, would not establish the illegitimacy of these children; but that their mother having stated herself to be a Roman Catholic to the priest who celebrated the marriage, and having since lived with Patrick Darcy as his wife, and been treated by him as such, she is now, as it were, estopped from denying the validity of her marriage; and for that purpose the case of *The Queen v. Orgil* (a) has been referred to. That was a prosecution for bigamy, the first marriage having been celebrated by a Roman Catholic priest; and it appeared that, at the time of this marriage, the prisoner alleged to the priest and to the woman he was marrying that he was a Roman Catholic. The learned Judge is reported to have stated that he would hold him estopped from denying the truth of what he then stated; but it is to be observed, that there does not appear to have been any evidence to contradict the truth of the statement which he so made, nor does it appear that the learned Judge's attention was directed to the strict provision of the Acts to which I have referred; and, therefore, that can scarcely be considered as an authority even in the case of a prosecution for bigamy; and should a similar question again arise, it will deserve very serious consideration, whether the case before Chief Baron O'Grady, in the note to the case in *Carrington & Payne*, is not a safer authority to follow. In that case, which also was a prosecution for bigamy, the prisoner had made similar representations as to his being a Roman Catholic; but at the trial he produced

(a) 9 C. & P. 80.

evidence to show that he was in fact a Protestant, and his Counsel contended that, being a Protestant, his first marriage was void, and therefore that he should be acquitted of the charge of bigamy. The Chief Baron is reported to have acquiesced in the law laid down by the prisoner's Counsel, and stated the question to be whether he was a Protestant or a Roman Catholic at the time of his first marriage; but that on that question he supposed the jury would be satisfied with what the prisoner himself stated on the subject, which, as might be anticipated, they were, and convicted the prisoner. I confess I can understand that if a man represents himself to a Roman Catholic woman that he is a Roman Catholic, and she, relying on the faith of such representation, is married to him by a Roman Catholic priest, and he afterwards, in a proceeding in an Ecclesiastical Court between him and the woman whom he has so induced to marry him, is endeavouring to get rid of the effect of the marriage, it might be very strongly argued that he would be estopped by his own statements, on the authority of the well-known case of *Picard v. Sears* (a), and that class of cases; but be that as it may, it does not occur to us that these considerations apply to a case like the present, in which, if any credence is at all to be given to the mother of these children, the alleged husband was as well aware as she was that at the time of her marriage she was a Protestant, and where, if any such representation was made as stated by Mr. Kearney, it must have been made merely to induce him to celebrate the marriage, and not to induce the husband to believe that any such representations as to her religion were true; but whatever foundation there may be for such an argument in an immediate proceeding between the parties, we cannot find any principle that would render such an argument applicable in a case like the present. Where the inquiry is as to the *status* of the children, we are not aware of any principle or authority to prevent the mother being a witness to establish either the legitimacy or illegitimacy of her children, on the grounds alleged to exist in the present case. In the case of *Kirwan v. Kirwan*, to which I have already referred, a somewhat similar question might have been raised. In that case,

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(a) 6 Ad. & Ell. 469.

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one of the grounds for invalidating the marriage of Celia Hopkins with Edward Kirwan was that, prior to her marriage with Mr. Kirwan, she had been married by a Roman Catholic priest to a private soldier of the name of Patterson; but the effect of this marriage with Patterson was altogether got rid of by the evidence of Patterson, who was examined as a witness at the trial, and proved that at the time of this marriage he was a Protestant. It did not occur to any of the able Counsel in that case, that there was any objection to the evidence of Patterson. On the whole, therefore, we cannot hold in this case that the mother of these children is incompetent to prove their illegitimacy. But Mr. *White* has further argued that, though the mother is not an incompetent witness to give evidence of the matters stated in her affidavit, yet that the presumption of the validity of the marriage and the legitimacy of the children, from the facts of marriage, cohabitation, and reputation, is so strong as not to be rebutted by the evidence of the mother of these children, though corroborated by the other evidence to which I have so frequently referred; and for that proposition he relies on the case of *Piers v. Piers* (a). Of course, we sitting here do not presume to question the propriety of that decision, but we are at liberty to consider its application to the case before us. That was a bill filed in the Court of Chancery by the younger children of Sir John Piers, to raise portions. The defendants alleged the children to be illegitimate. The evidence showed clearly that Sir John Piers was married to the mother of the children in a private house in the Isle of Man, by one of the officiating Protestant clergymen of the district; that from the time of the marriage the parties lived together and were treated as man and wife, and that the children were always treated and recognised as legitimate. The objection to the marriage was that, according to the law of the Island, a marriage in a private house was null and void unless celebrated in pursuance of special license from the bishop. It appears that there was no office or place where such licenses were regularly kept; and though it appeared that several marriages had been celebrated in private houses, in pursuance of licenses regularly obtained, no trace of several of such licenses could be found,

(a) 2 H. L. Cas. 331.

including one for the marriage of a man of high position, the nephew of the bishop. It appeared that no license could be found for the marriage of Sir John Piers; and the Bishop of Sodor and Man, who succeeded to the bishopric some short time before the marriage, was examined as a witness, and deposed that he had not granted any license; and he stated some reasons why he should have recollected if he had granted any such. It appeared, however, that in the time of the previous bishop, Sir John Piers had made some preparations for his marriage, which, however, was deferred in consequence of the non-arrival of his brother, a clergyman. There was a great deal of evidence on the subject, both on the one side and the other. When the case came before the Lord Chancellor Brady, he thought the case not ripe for decision, and directed an issue, the question to be, whether, prior to the marriage of Sir John Piers, any license was granted by the bishop, such as required by the laws of the Island? From this decree the plaintiffs appealed to the House of Lords, insisting that the Chancellor should not have directed such an issue, but should himself have decided in favour of the legitimacy. The House of Lords decided that the presumption of the validity of the marriage was merely a presumption of fact, and not of law, which might be contradicted by other evidence; but they held that, in the case before them, the presumption in favour of the validity of the marriage vastly preponderated. What they relied on was, that it was the intention and interest of Sir John Piers to have the marriage legally solemnised, so it was also the duty of the officiating clergyman to have it legally celebrated; and he must have been aware of the necessity of the license. As against all this there was only the evidence of the bishop, which the House of Lords considered to amount only to this,—that he did not recollect the granting of the license, that it was an official document which might have been laid before him for his signature by his secretary, without his attention being expressly called to it, and he, therefore, might have forgotten it; besides, it was not improbable that the license might have been obtained from the previous bishop, and retained, as the marriage, though then contemplated, was postponed. There was no suggestion of any further evidence being likely to be produced at

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the trial of the issue; and their Lordships were of opinion that if, on the present evidence, a verdict was found against the validity of the marriage, that such a verdict should be set aside, as against the evidence. They also found fault with the form of the issue, which should have been generally as to the marriage of the parties or the legitimacy of the children, so as to give the plaintiff, at the trial, the full benefit of the presumption, and not on the isolated fact whether the special license had been obtained; and, under all the circumstances, they considered the evidence in favour of the marriage so far to preponderate, that they at once decided in favour of its validity, but altogether as a matter of fact. This case was so strongly pressed in the argument before us, that I have thought it necessary to state the facts of it at length, in order to show that it would have no application to this case, unless we were prepared to decide affirmatively that the mother of the children was not a Protestant at the time of her marriage, and did not profess to be so within twelve months before; that is, in other words, altogether to ignore the evidence of this woman, corroborated as it is by other evidence not in any way impeached. I believe I have now adverted to all the arguments which have been adduced in support of the application to make absolute the order for issuing the writ of *habeas corpus*; and it only remains to consider what we should do on this motion. As I have already stated, we cannot give the custody of these children to the applicants, without deciding affirmatively that they are the legal testamentary guardians of these children, and so deciding in a case where there could be no appeal from our decision. This, having regard to the authorities to which I have referred, we cannot do; but then, in refusing this application, we are not called upon to decide affirmatively that these children are illegitimate. We do not mean to do so; and it is satisfactory to us to know that if we have made any mistake, either in drawing a wrong inference from the affidavits, or in the law as applicable to these facts, that the applicants are not without remedy. The statute enabling a father to appoint guardians expressly points out the remedy. It authorises the guardians to bring a writ of ravishment of ward, or an action of trespass, against any person improperly detaining the

ward from the guardian; and nothing that we do here can, in any way, prevent the applicants here bringing such an action; and in such an action, if brought, the various points pressed by the Counsel in the present case can be more solemnly decided; and in such a proceeding the parties will, of course, have an opportunity of bringing the case before the Court of Appeal. In conclusion, therefore, of this, which I feel to have been a rather lengthened, judgment, we must allow the cause shown against making the conditional order absolute, but we do not think it a case to give costs. I have not at all alluded to the fact of these children being now brought up as members of the Established Church, that being a matter with which we, as a Court of Law, have nothing to do; we can only give the custody of the children to the persons legally entitled to such custody. If, for any reason, it is right that these children should be brought up as directed by their father's will, application must be made on that subject to the Court of Chancery, which is the proper Court to adjudicate on such matters.

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Cause allowed.

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DEMURRER—The summons and plaint stated that certain differences had existed between the plaintiff and defendant, which they had submitted to the award of two arbitrators, so that they made such award in writing, under their hands and seals, on or before the 1st of January 1859; and, in consideration of the same, that the plaintiff and defendant had mutually promised and agreed to perform and fulfil such award; that the time so limited for the making of the

An award directed that certain sums of money should be paid by one of the parties to the other, and that the former should secure the payment by his bond and warrant of attorney to enter judgment thereon; and, further, that the warrant should be lodged with the arbitrators, and that judgment should not be entered without their consent. — *Held*, that the latter provision, being of the body and substance of the award, and not beyond the power of the arbitrators, could not be rejected as surplusage.

Held also, that, inasmuch as it reserved a future power to the arbitrators, it rendered the award uncertain, inconclusive and void.

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award had been extended, and that, within the time so extended, the arbitrators did make an award in writing, under their hands and seals, concerning the differences between the parties, upon the 26th of January 1860; and, amongst other things, ordered that the partnership found to exist between the plaintiff and defendant should, from the date of the award, cease, and stand dissolved; that one of the parties should retire, and that the assets of the partnership should be distributed as follows:—that the retiring partner should receive the ready money, amounting to £830.16s., also the sum of £551.11s.11d., as the balance of his share, from the continuing partner, and £150 for the share of the business; that these latter sums should be chargeable on the plant and debts due, and upon the continuing trader personally, and that he should forthwith secure the same, by his bond and warrant to enter judgment thereon, but that the warrant should be lodged with the arbitrators, and judgment not be entered without their consent. That these sums should be paid by instalments of £100 a-month (specifying the days of payment), with interest at £5 per cent.; and, further, that the defendant should have the privilege, up to the 31st of January 1860, then next ensuing, to elect whether he would retire from the partnership, and that the plaintiff should be bound by such election, if made; and that, if the defendant did not before said day select the position of retiring partner, he should be deemed to have elected to continue in the business; and that the plaintiff should thereupon become entitled to the share of the retiring partner, and to receive the aforesaid sums of money from the defendant, as continuing trader.

Averment:—That the defendant afterwards, on the 1st of February 1860, elected to continue in the business, and to accept the portion of continuing trader. That the plaintiff, accordingly, prepared a bond and warrant of attorney, and tendered the same to the defendant for execution, but that the latter, disregarding his promise in that behalf, refused to execute the same.

Demurrer:—Upon the grounds that the summons and plaint does not show that it was incumbent upon the defendant to execute the bond. That it is not averred that the defendant, before, or on

the 31st of January 1860, did any act amounting to an election to remain as continuing trader; and that, consistently with the averments therein, he may have elected to retire on the 31st of January. That the averment of an election on the 1st of February is immaterial. That the award was not final, but, uncertain and inconsistent.

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W. O'Brien opened the demurrer.

J. G. Brown and *Chatterton*, in support of the pleading.

Sullivan, in reply.

The following authorities were referred to in the argument:—
Vincent v. Scully (a); *Ward v. Dean* (b); *Moore v. Butlin* (c);
Wood v. Griffiths (d); *Manser v. Heaver* (e); *Goddart v. Mansfield* (f); *Miller v. De Burgh* (g); *Taylor v. Shuttleworth* (h);
Bradshaw's Arbitration (i); *Selsby v. Russel* (k); *Winch & Grove v. Sanders* (l); *Pedley v. Goddard* (m); *Storke v. De Smith* (n);
King v. Fines (o); *Tomlin v. The Mayor of Fordwich* (p).

Cur. ad. vult.

MONAHAN, C. J., delivered judgment of the Court.*

This case comes before the Court upon demurrer to the summons and plaint. It appears by the summons and plaint that the plaintiff and defendant, who are brothers, had been in business together; that certain differences had arisen between them, and that they had agreed to refer their disputes to arbitration, and to abide by

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| (a) 10 Ir. Law Rep. 28. | (b) 3 B. & Ad. 234. |
| (c) 7 Ad. & El. 602. | (d) 1 Swanst. 52. |
| (e) 2 B. & A. 295. | (f) 19 Law Jour., Q. B., 305. |
| (g) 4 Exch. 809. | (h) 6 B. N. C. 277. |
| (i) 12 Q. B. 562, 573. | (k) Comb. 456. |
| (l) Cro. Jac. 584. | (m) 7 T. R. 73. |
| (n) Willes, 66. | (o) Sid. 59. |
| (p) 5 Ad. & Ell. 147. | |

* Mr. Justice KEOGH was absent at the Consolidated Nisi Prius Court.
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and perform the terms of the award, when made, provided it was made and published before the 1st of January 1859. It appears that the time for making the award was subsequently extended, and that, within the time so extended, the arbitrators did, upon the 25th day of January 1860, make their award in writing, under their hands and seals, whereby they ordered that the partnership found to exist between the plaintiff and defendant should, from the date of the award, cease and determine; and, further, that the entire of the assets of the partnership should be distributed in the following manner:—that the retiring partner was to receive £830. 16s. 1d. in cash, and also £551. 11s. 11d. as the balance of his share in the partnership, from the continuing partner (who was to carry on the business on his own account), and also £150 for his share of the business. It was also provided by the award that these sums should be chargeable upon the plant and debts due to the establishment, and also upon the continuing trader personally, and that he should secure the payment thereof by his bond and warrant of attorney to confess judgment thereon, but that the warrant should be lodged with the arbitrators, and judgment not entered without their consent. The award also provided that these sums were to be paid by instalments, at the rate of £100 a-month, specifying the days upon which each payment was to be made; and there was a further provision, that the defendant should have the privilege, up to the 31st of January 1860, of electing whether or not he would retire from the partnership, and that the plaintiff should be bound by his election; and that if before that day, the defendant did not make such election, that, in such case, he should be deemed to have elected to continue in the business, and that the plaintiff should then become entitled to the share of the retiring partner. Such was the award stated in the summons and plaint, as far as the present case is concerned. The plaintiff then proceeds to aver that the defendant, afterwards, on the 1st of February 1860, elected to continue in the business, and to accept the portion of continuing partner; and that the plaintiff, accordingly, prepared a bond and warrant of attorney,

and tendered it to the defendant for execution, but that the latter refused to execute it. The first cause of demurrer assigned and argued was, that it did not appear whether the plaintiff relied on an express election by the defendant to remain as continuing trader, or whether the plaintiff relied on the defendant not having made any election on or before the 31st of January, the day specified in the award for that purpose, the election in the summons and plaint having been stated to have been made on the 1st of February. We stated, in the course of the argument, that we would not permit such a question as this to remain upon the record; and we, accordingly, made an order that the record should be amended, either by stating an express election within the time, or, if no such election had been made, that it should be so stated; and that, by reason of no election having been made, defendant became continuing trader, and that notice thereof had been given to the plaintiff.

This being so, then arises the next question upon the demurrer, and it is the only one which we intend to decide, namely, whether this is an award, final and conclusive in its nature, upon which an action may be brought? One point only has been relied upon by Mr. *Sullivan*. The award directs that the sums which were payable by monthly instalments should be secured by the bond and warrant of attorney of the continuing trader. We are all aware that a bond and warrant of attorney entitles the person to whom it is made to enter judgment upon it immediately, no matter when the amount of the bond is payable; and that judgment, being registered, becomes a real security, affecting any lands the property of the debtor at the time of the rendition of the judgment, in the nature of a mortgage. Therefore it was clearly the intention of the arbitrators not merely that the payment of this money should be secured by bond, but also that the security might, without any delay, be capable of being turned into a judgment, which might immediately operate as a real security upon the lands of the judgment debtor. But this award contains a further provision, that the warrant of attorney should remain in the hands of the arbi-

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trators, and that judgment should not be entered upon it without their consent; thus giving them a further discretion, as to the time at which this bond should become a security affecting the real estate of the obligor. Upon this part of the award an objection has been raised, viz., that it reserves a future power to the arbitrators, and that it is, for that reason, not final and conclusive, and consequently void.

The case has been argued at considerable length, and several authorities have been cited. In support of the award it has been contended that this provision, that the warrant should remain in the hands of the arbitrators, might be rejected as surplusage, being beyond the power of the arbitrators; and we were referred, in support of that view of the case, to the case of *Manser v. Heaver* (a). In that case, a verdict had been taken by consent, subject to the award of a barrister, to whom the action, and all matters in dispute between the parties, were referred. The arbitrator directed that the verdict should stand for £50, but added that, in case certain acts, which the award provided should be done, were not done to the satisfaction of the plaintiff, he might be at liberty to adduce further evidence of that fact, so that a final award might be made. A motion having been made to set aside a judgment entered in pursuance of the award, on the ground that the latter was not final, the Court of Queen's Bench held that the validity of the award was not affected by the introduction of the provision as to a future award, that being a matter beyond the scope of the reference, and referring to future prospective differences. *Miller v. De Burgh* (b) is another case to which we have been referred. The facts of that case appear to be rather complicated, and not very clear. It was an action by solicitors to recover the amount of two bills of costs, brought against the defendant as member of a company; and a verdict was entered for "£3000 damages, and one shilling damages on the judgment on a demurrer in the cause," subject to the award of an arbitrator, to whom the entire matter was referred. He awarded that the £3000 damages should be reduced to one shilling, besides

(a) 3 B. & Ad. 295.

(b) 4 Exch. 809.

the one shilling entered on the demurrer; and, further, that the plaintiffs should receive from the defendant, in pursuance of a certain agreement, two sums of money, as soon as they shall have discharged the demands of certain persons; and that, upon production of proper vouchers from the latter, and upon proof that these claims had been discharged, the plaintiffs should be entitled to receive these two sums of money. The award was objected to as being inconclusive, upon the grounds that the plaintiffs might be unable to make proof satisfactory to the defendant; but Chief Baron Pollock held that the latter portion of the award might either be rejected as surplusage, or that it was the very matter agreed to be done by the parties before the award was made; but that the award, being divisible, was not vitiated by the clause objected to. *Moore v. Butlin* (a) was a similar case; but the facts are by no means clear; nor does the decision of the Court enable us to apply it satisfactorily to the present case. *Ward v. Dean* (b) was a singular case. The arbitrator in that case directed "that a verdict should be entered for J. Dean, instead of the verdict and damages which had been found for the plaintiff; and, further, that J. Dean should pay the costs of the reference and award." The arbitrators appear to have intended that the plaintiff should have paid the costs; but the Court held that, the award having been regularly executed, the arbitrator could not rectify the error; and the defendant actually paid the costs. In the present case, Mr. *Chatterton* did not argue that such a discretionary power could be reserved by the award; for he was aware that the award could not be supported upon such grounds, inasmuch as it would confer upon the arbitrators a future power of deciding whether they should allow judgment to be entered upon this bond; or whether, by refusing to do so, they should expose the plaintiff to the risk of the defendant becoming bankrupt; and, accordingly, his argument was, that the Court might reject altogether that portion of the award relating to the retention of the warrant, as matter of surplusage, and that the plaintiff would be entitled to have the bond and warrant, and a right immediately

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(a) 7 Ad. & Ell. 595.

(b) 3 B. & Ad. 284.

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to enter judgment. But, as an authority against this view of the case, we have been referred to the case of *Tomlin v. The Mayor of Fordwich (a)*. In that case, disputes had arisen between landlord and tenant, and it was agreed to refer them to arbitration; and the arbitrator awarded that the premises should be put into good and tenantable repair, to the satisfaction of James Moyes; and Lord Denman held that, the only direction as to repairs being that they should be completed to the satisfaction of a third party, that objection was insuperable. In that case, a similar argument was urged upon the Court, namely, that the words "to the satisfaction of James Moyes" might be rejected; but the Court decided that they could not do so, that clause being of the body and essence of the award.

We must, therefore, as best we can, apply the principle to be deduced from those cases to the present. It appears to us clear that the arbitrators intended what they expressed, namely, that the retiring partner was not only to be paid by the continuing trader a considerable sum of money by certain instalments, but that he was to have this money secured by the bond and warrant of attorney of the continuing trader; and the action is brought for the not executing this bond and warrant of attorney. It is, therefore, clear that we cannot reject the portion of the award which directs the bond and warrant to be executed. It occurs to us, as equally clear, that we cannot reject that portion of the award which directs the warrant to be retained by the arbitrators, the effect of which would be to enable the plaintiff immediately to enter judgment for the full amount of the penalty of the bond. We all know that it is extremely injurious to a trader to have a judgment on record against him; and we are quite clear that we should be deciding directly contrary to the intentions of the arbitrators if we were to hold that judgment might be immediately entered on the bond. What the arbitrators intended was, that if any change took place in the circumstances of the continuing trader, so that bankruptcy or insolvency might be apprehended,

they, the arbitrators, should have the power of permitting judgment to be entered on the bond and warrant, though no default had been made in payment of the instalments previously due.

This discretion appears to us to be so essential a part of this award, that we do not feel ourselves at liberty to reject it; and by retaining it we must hold the award void, as not being final and conclusive. We are quite aware that, by coming to this conclusion, we probably shall involve these brothers in a very expensive and unprofitable litigation; this, however, we cannot avoid; and, for the reasons I have stated, we must hold this award void, and allow the demurrer.

Demurrer allowed.

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Exchequer Chamber.*

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Feb. 2.

(Error from the Court of Common Pleas.)

A full and complete description of the subject-matter of a deed being followed by another description in the same instrument, the first description will be preferred, although the second is equally full and complete; and, therefore, where a deed of conveyance purported to convey "the town and lands of Dromardmore, situate in the barony of J. and county of T., containing 1085a. Or. 23p., statute measure, or thereabouts, and described in the annexed map, with the appurtenances;" and where it was proved that the map annexed

THIS case came before the Court of Exchequer Chamber, upon a writ of error, brought upon a judgment of the Court of Common Pleas. It was an action of ejectment upon the title, brought by the plaintiff to recover the possession of a portion of the lands of Dromard or Dromardmore, containing about forty-five acres, and whereon were situate certain houses, now or late in the possession of certain persons (named in the summons and plaint), situate in the parish of Killovenoge and barony of Ikerrin, county of Tipperary.

The defence alleged that the forty-five acres in dispute, which it described as part of the lands of Dromardbeg, were erroneously called in the summons and plaint part of the lands of Dromard or Dromardmore, and claimed them as the property of the defendant. At the trial of the case, before Lord Chief Justice Monahan, at the Summer Assizes for the North Riding of the county of Tipperary 1858, the following issue was submitted for trial:—Whether the plaintiff was entitled to the possession of the said lands, containing forty-five acres or thereabouts, whereon the said houses now or late in the possession of the said James Keys and Maria Dowling are situate, whether the said lands be called Dromard or Dromardmore, or Dromardbeg, or to any part of the said lands, to the deed comprised a portion of the lands called Dromardbeg, and not Dromardmore—*Held*, that the first description in the deed, of the lands of Dromardmore, being sufficiently complete and certain, should prevail over the second description, comprised in the words "described in the annexed map;" and that nothing passed by the said deed which was not part of Dromardmore.

* *Coram* LEFROY, C. J.; FIGOT, C. B.; O'BRIEN and HAYES, JJ.; GREENE, HUGHES and FITZGERALD, BB.

on the said day, or at any time subsequent to such day, and before the commencement of such action.

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The plaintiff's title depended upon a conveyance from the Commissioners of the Incumbered Estates Court, which was given in evidence; and, after reciting that George Roe, late of Loran-park, in the county of Tipperary, had been, on the 3rd day of August 1852, declared purchaser of the town and lands of Dromardmore, in the barony of Ikerrin and county of Tipperary, for the sum of £1115, and that George Roe had paid that sum into the Bank of Ireland to the credit of the estate, and had died on the 22nd of August 1852, having, before his death, appointed his eldest brother and heir-at-law, Robert Roe, and also Catherine White, executor and executrix of his will, and that the said Robert Roe had taken out probate of the will of George Roe, proceeded in these words: "Now we, Mountiford Longfield, LL.D., and Charles "James Hargreave, Esq., Commissioners, &c., in consideration of "the said sum of £1115 sterling, by George Roe, of Loran-park, "since deceased, so paid as aforesaid, do grant unto the said Robert "Roe, of Loran-park, in the county of Tipperary, Esq., the town "and lands of Dromardmore, in the barony of Ikerrin and county "of Tipperary, containing 1085a. Or. 23p., statute measure, or "thereabouts, and described in the annexed map, with the appur- "tenances, to hold the same unto the said Robert Roe, discharged "from all quit or Crown-rents, which have been redeemed by the "said Commissioners, and subject to the lease referred to in the "schedule hereunto annexed; subject, however, to the same trusts, "intents and uses as if the said grant had been made to the said "George Roe before his decease." The date of this conveyance was June 30th, 1853. In the schedule to this conveyance, the lands were described as Dromardmore; the name of the tenant was given; the quantity of land stated to be 1085a. Or. 23p.; yearly rent, £42. 12s.; gale-days, March 25th and November 29th; and the tenure, a lease, bearing date October 17th, 1709, for three lives renewable for ever. The plaintiff also proved another deed of conveyance from the Commissioners of the Incumbered Estates Court, bearing date the 5th of July 1854, to the plaintiff, of the lands therein

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described as, first, the lands of Dromard otherwise Dromardmore as demised by the aforesaid indenture of the 17th of October 1709, excepting thereout that portion expressed to be demised by the therein recited indenture of the 9th of December 1771, and also excepting that other portion thereof assured by the therein recited indenture of the 12th of March 1826; secondly, all that other part of the lands of Dromard expressed to be demised by the therein recited indenture of the 9th of December 1771 (excepting as therein), and containing 641a. 3r. 46p., plantation measure, or thereabouts, situate in the barony of Ikerrin and county of Tipperary. The plaintiff also produced witnesses who proved that they knew the lands of Dromardmore, and that the forty-five acres in question, and the houses, lay within the boundaries of the map annexed to the deed of 1853; that Dromardmore was divided by a road and stream of water from Dromardbeg; that these forty-five acres were within what was called the Hill-division of Dromardmore. The defendant, at the close of the plaintiff's case, called a witness who proved that the forty-five acres in dispute were part of the lands of Dromardbeg, and not of Dromardmore.

At the close of the trial, the learned Judge told the jury that whether the lands in question were Dromardmore or Dromardbeg was immaterial, provided they were included in the map attached to the conveyance of 1853; and that, if they were included in that map, they passed under that conveyance, whether they were part of Dromardmore or Dromardbeg. The defendant's Counsel then called upon his Lordship to inform the jury that the question for them to try was, whether the lands in dispute were in fact part of Dromardmore or Dromardbeg, and to inform them that, if they were Dromardbeg, they should find for the defendant; and, the learned Judge having refused so to do, the defendant's Counsel excepted thereto. The jury found a verdict for the plaintiff.

The exceptions having been argued before the Court of Common Pleas upon the 22nd, 23rd and 27th of January 1859, the Lord Chief Justice delivered the judgment of that Court, allowing the exceptions, and awarding a *venire de novo*.*

* 9 Ir. Com. Law Rep. 184.

A writ of error having been brought upon that judgment to the Court of Exchequer Chamber by the plaintiff—

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J. E. Walsh and *Ryan*, for the plaintiff in error, contended that the description in the map was of greater certainty than the words of the deed, upon the principles *præsentia corporis tollit errorem nominis*, and *nil facit errorem nominis quum de corpore constat*: *Bacon's Tracts*, pp. 102, 103; *Broom's Legal Maxims*, last ed., p. 565. They also cited *Doe d. Smith v. Galloway* (a); *Errington v. Rorke* (b), and in House of Lords, *ex relatione* (c); *Preston's Conveyancing*, pp. 285, 286; *M'Nevin's Incumbered Estates Court Practice*, p. 148; *The Dublin and Kingstown Railway Company v. Bradford* (d); *Wrottesley v. Adams* (e); *Llewellyn v. Jersey* (f); *Jack v. M'Intire* (g); *Jack v. Bell* (h).

R. Armstrong and *Loughnane*, contra, cited *Bacon's Tracts*, p. 104; *Doddington's case* (i).

Walsh was heard in reply.

Cur. ad. vult.

LEFROY, C. J., now delivered the judgment of the Court.

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June 9.

This case comes before the Court upon a writ of error from the judgment of the Court of Common Pleas, pronounced upon the argument of a bill of exceptions taken upon the trial to the opinion of the learned Judge. The action was an ejectment upon the title, brought to recover possession of a portion of certain lands, called Dromard or Dromardmore, containing about forty-five acres, whereon were situated certain houses, now or late in the possession of James Keys, Maurice Dowling and Michael Corcoran, situated in the parish of Killovenoge, barony of Ikerrin and county of Tipperary.

(a) 5 B. & Ad. 3, 447.

(b) 6 Ir. Com. Law Rep. 353.

(c) 9 Ir. Com. Law Rep. 367.

(d) 7 Ir. Com. Law Rep. 57, 624. (e) Flou. 187.

(f) 11 M. & W. 189.

(g) 12 Cl. & Fin. 181.

(h) 5 Jebb & Sym. 432.

(i) 2 Rep. 32.

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We have here an identification of the lands claimed by the plaintiff, not only by name, but also by occupation. The defendant took defence for the entire of the lands mentioned in the summons and plaint, but describing them as the lands of Dromardbeg, containing forty-five acres, whereon were situated the houses mentioned in the summons and plaint, and stating that the lands were erroneously described in the summons and plaint as the lands of Dromard or Dromardmore. Upon these pleadings the following issue was knit:—
 “Whether the plaintiff was entitled to the possession of the said lands, containing forty-five acres, or thereabouts, whereon the said houses now in the possession of the said James Keys and Maurice Dowling are situate, whether the said lands be called Dromard or Dromardmore, or Dromardbeg, or to any part of the said lands, on the said day, or at any time subsequent to such day, and before the commencement of this action?” The case came on for trial before the Lord Chief Justice of the Court of Common Pleas, at the Summer Assizes for the North Riding of the county of Tipperary; and the plaintiff, in support of his case, relied upon a deed of conveyance (referred to as marked with the letter A), executed by the Commissioners of the Incumbered Estates Court, bearing date the 30th of July 1853, whereby they grant unto Robert Roe “the town and lands of Dromardmore, situate, &c., containing 1085a. Or. 23p., statute measure, or thereabouts, and described in the annexed map, with the appurtenances, to hold the same unto the said Robert Roe, his heirs and assigns, discharged of all quit and Crown-rents, which have been redeemed by the said Commissioners, and subject to the lease referred to in the schedule hereunto annexed.”

The plaintiff also gave in evidence the several other deeds and documents referred to by the bill of exceptions, marked with the letters B, C, D, E and F; but they all import to deal only with the lands of Dromard or Dromardmore.

The defendant's case was this, that, in point of fact, the lands in question were not part of the lands of Dromard or Dromardmore, but that they were portion of the lands of Dromardbeg, which is a separate denomination and parcel of land from Dromard or Dromardmore. Evidence was gone into, and uncontradicted, to the effect

that Dromardbeg was a distinct denomination and parcel of land from Dromardmore, and that the houses mentioned in the summons and plaint were all upon the lands of Dromardbeg, and not on the lands of Dromardmore. Upon this evidence it was contended, on behalf of the plaintiff, at the trial, and also upon the argument below, and in this Court, that, inasmuch as the forty-five acres in question are contained within the map annexed to the deed of the 30th of July 1853, from the Commissioners, although not being any part of the lands of Dromardmore mentioned in the granting part of the deed, they must be held to have passed by that conveyance, whether they were part of Dromardmore or Dromardbeg, according to the decision in *Errington v. Rorke*.^{*} The Lord Chief Justice held that they did so pass, and directed the jury to find a verdict for the plaintiff. A bill of exceptions was taken to this direction; and it was insisted, on behalf of the defendant, that the learned Judge should have told the jury that the question for them to decide was, whether or not the lands in dispute were part of the lands of Dromard or Dromardmore, which the deed imported to convey, or of Dromardbeg, and that, if they believed that they were part of the lands of Dromardbeg, that they should find for the defendant; and, upon his refusal so to direct, this exception was taken, and, upon argument, has been allowed by the Court of Common Pleas, and a *venire de novo* awarded; and the question now comes before us upon this writ of error. This Court is unanimously of opinion that the judgment of the Common Pleas should be affirmed; that the direction^{*} of the Lord Chief Justice was erroneous, and that the judgment allowing the exception was correct.

The present case is perfectly distinguishable from the case of *Errington v. Rorke*; but, before I proceed to compare them, I wish to make a general observation, which is equally applicable to conveyances by the Commissioners of the Incumbered Estates Court as to any others: and it is this:—The first point to be ascer-

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^{*} NOTE.—A report of the decision of this case in the House of Lords has been printed (*ex relatione*) in the 9 Ir. Com. Law Rep., p. 357.

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tained is, what the conveyance (whether with or without a map) must be deemed to pass, according to its legal effect and operation, having regard to the evidence and the principles of construction applicable to the case.

Then, but not till then, arises the question as to the authority of the Commissioners to give a title to the lands which that instrument imports to pass, according to its legal construction and effect. In this case the plaintiff claims, by his summons and plaint, forty-five acres of the lands of Dromard, otherwise Dromardmore, which he further identifies as then or lately in the possession of certain persons named therein; and to sustain that claim he gives in evidence a conveyance from the Commissioners of the Incumbered Estates Court, with a map annexed. By that deed the Commissioners grant "the town and lands of Dromardmore, in the barony of Ikerrin, and county of Tipperary, containing 1086a. Or. 23p. statute measure, or thereabouts, and described in the annexed map, with the appurtenances." But the annexed map, according to the evidence, contains not the lands of Dromardmore, but the lands of Dromardbeg, a distinct denomination and parcel of land, in the occupation of the persons alleged to have held the lands of Dromardmore, claimed by the plaintiff, but who, according to the evidence, do not hold them, but hold the lands of Dromardbeg, belonging to the defendant. Now, supposing that to be so, what is the rule of construction in such a case, looking to the deed, the map and the evidence? I take the rule to be this, as laid down in *Shep. Touch.*, pp. 99, 246, 247:— "Whenever there is, in the first place, a sufficient certainty and demonstration, and afterwards an accumulative description, and it fails in point of accuracy, it will be rejected. *Falsa demonstratio non nocet.*" This rule is stated and exemplified in a variety of cases, collected from *Brooke*, *Plowden*, *Dyer* and other ancient authorities; from which it also appears that the grant of land, by its name, constitutes *prima facie* that "sufficient certainty and demonstration" which will satisfy the rule. Thus, it is said, "If one grant all his lands in *Dale*, which he had of the gift of J. S., by this grant (thus restricted) nothing will pass but that which he had of the gift of J. S. But if one grant all his lands in *Dale*, called *Hodges* (being a full description and certainty in itself),

“ which he had of the gift of J. S., by this grant all that which is
 “ called *Hodges* shall pass, albeit the grantor had it not of the gift
 “ of J. S. (for *falsa demonstratio non nocet*.)” So again, in another
 case it is said, “ If a parish lie in two counties, viz., *Berks* and
 “ *Wilts*, and one grant in this manner, ‘ all his close called *Callis*,
 “ in the parish of *Hurst*, in the county of *Berks*,’ and in truth the
 “ close doth lie in the county of *Wilts*, this is a good grant to pass
 “ the close (because the close passes by the name as a full and cer-
 “ tain description).” In the present case, we have the certainty of
 the name of the close intended to be passed, and, in addition to the
 principle of law, there is evidence which abundantly negatives its
 being the close delineated on the map, which must, therefore, be
 rejected as a *falsa demonstratio*. So again it is said in another
 case, “ If one grant in this manner, ‘ my manor of *Dale*, which
 “ appeareth by office found to be of the value of £10 per annum,’
 “ and in truth in the office it is found at £20 per annum, this grant
 “ is good, notwithstanding this misprision (because there is a cer-
 “ tainty, with a false demonstration).” But it has been argued that,
 as the map was held to be the guide in the case of *Errington v.*
Rorke, so it should be in the present case ; but in that case the deed
 made the map the guide. The grant was “ part of the Bog of Allan
 and Clunagh ;” but what part was not further specified than by
 reference to the annexed map, which alone afforded any certainty
 or ascertainment as to what part was intended to pass. It was not a
 grant of “ the Bog of Allan and Clunagh,” but only a part, and
 what part was only ascertained or ascertainable by reference to the
 map. The map was, therefore, the only means of certainty as to
 what was intended to pass. In the present case, by the grant of
 Dromardmore, by its name, *constat de corpore*. There is also the
 positive evidence to show that the map is “ *falsa demonstratio*,” as
 to the description by occupation, in the summons and plaint, of
 the land claimed by the plaintiff. We have also the authority of
 this Court in the case of *The Dublin and Kingstown Railway Com-*
pany v. Bradford, which appears to be quite decisive, to show that
 where the map conflicts with the grant, which contains a certainty
 beyond doubt, the map may be rejected as *falsa demonstratio*.

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It might be further suggested in this case, as occurs to me indivi-

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dually, as a further distinction from the case of *Errington v. Rorie*, that there was evidence in that case, by production of the preliminary proceedings, of an authority to sell the denomination (*Muckland*) there claimed; but in the present case there was no evidence, by the production of the petition or other preliminary proceeding, of an authority to sell the lands of *Dromardbeg*. If, therefore, they could not be included *inferentially* in the conveyance from the Commissioners, so as to raise a *presumptio juris et de jure* of an authority to sell, they would not pass under the conveyance. We are all, however, of opinion, upon the grounds first stated, that the judgment of the Court of Common Pleas should be affirmed.

PIGOT, C. B.

I fully adopt all the reasons given by the LORD CHIEF JUSTICE. The deed of conveyance affords evidence of what the Commissioners purported to sell; and that was the lands of Dromard, or Dromardmore; and they must be taken to have conveyed nothing more than what they purported to sell.

FITZGERALD, B.

I wish to be understood as concurring, upon the grounds solely that this case is ruled by the decision in the case of *The Dublin and Kingstown Railway Company v. Bradford*.

O'BRIEN, J.

I am also of opinion that this case is ruled by the authority of *Bradford's case*. But even without that authority, I should have come to the conclusion that the reference to the map, preceded as it is by a full and complete description, cannot be taken as extending that description; but that the map is to be taken as *falsa demonstratio*, and rejected accordingly, upon the principle stated by the LORD CHIEF JUSTICE, and clearly laid down in *Shep. Touch*, p. 247. The judgment of the Court of Common Pleas, therefore, stands affirmed.

HAYES, J., and GREENE and HUGHES, BB., concurred.

Judgment affirmed.

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O'DONNELL v. REILLY.

(*Exchequer.*)

April 3 .

THIS was an application, on behalf of the plaintiff, to set aside the defence filed by the defendant, as being palpably false and a sham defence, and filed for the purpose of delay, and that the plaintiff might be at liberty to mark judgment, notwithstanding the filing thereof.

Where a defence is warranted by the Common Law Procedure Act, and raises a single issue, the Court will not try its truth or falsehood upon affidavit.

The action was brought upon a promissory note, by the indorsee against the maker. The defendant pleaded that he did not make the promissory note as alleged. Two affidavits were filed on behalf of the plaintiff, in support of the motion, one by a person named John Pierce, who swore that he was present on the 9th day of April 1858 in the office of Mr. Robert L. Kane, who was then, and still is, in this cause, the defendant's attorney, when the promissory note upon which this action was brought was drawn by the said Robert L. Kane, and that the defendant, who was a marksman, then and there set his mark to said promissory note, in the presence of said John Pierce and of Robert L. Kane, who first read same to the defendant. The promissory note, which was produced, contained a memorandum signed by Robert L. Kane, stating that he had read same to the defendant. An affidavit was also made by the payee of the note, Edward M'Keon, who swore that after the note became due he received a letter from the defendant, dated the 11th of October 1859, written by Robert L. Kane, apologising for the non-payment of the note, and promising to pay it in the month of November. That he also received a letter from Robert L. Kane, dated the 7th of November 1859, admitting the making of the note, and stating that defendant would pay it at once if he had the means. That the defendant had come to him, on several occasions, begging for time, and that he never, except by the defence in

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 REILLY. this action, suggested that he did not make the note. That the defence was wholly and entirely false, to the knowledge of the said Robert L. Kane and the defendant, and that it was filed solely for the purpose of delay. No affidavit was made by the defendant, or on his behalf.

M. Morris, in support of the application.

The letters of the defendant himself, and the affidavits filed on behalf of the plaintiff, show that this defence is palpably false, and filed only for the purpose of delay. When that appears, the Court has jurisdiction to set aside the plea: *Leathly v. Carey* (a). That was an ejectment for non-payment of rent, and there was a defence of payment, and the Court of Queen's Bench granted a conditional order to set aside the plea, grounded on the affidavits of the plaintiff and his agent. In *Armstrong v. Evans* (b), an action upon a promissory note, a similar order was made. He also cited *M'Kenna v. Burke* (c).

W. Sidney, contra.

In *Leathly v. Carey* the order was ultimately made on consent, so that the point was not decided. *Armstrong v. Evans* might have been decided upon other grounds, for other grounds are alluded to in the judgment, and the plea was embarrassing, irrespective of its truth or falsity. *M'Kenna v. Burke* is an authority against the motion. The defence in that case was a plea of judgment recovered, and the certificate given disproved the truth of the plea. The necessity for such a certificate being given, in pursuance of the 43rd General Order, shows that the plea of judgment recovered was intended to be an exceptional case. The rule is stated in 1 *Archbold's Practice*, p. 270. If a plea is palpably a tricky one, framed only for the purpose of delaying the plaintiff, a Judge will strike it out; but the Judge will not interfere to strike out a plea upon the mere ground of its being false, although the plaintiff swears it is so

(a) 8 Ir. Com. Law Rep., App., i.

(b) 8 Ir. Com. Law Rep., App., xxviii.

(c) 5 Ir. Com. Law Rep. 110.

in every respect. The effect of such an application is to call upon the defendant to verify his plea in every case, which is contrary to the intention of the Legislature. The Common Law Procedure Act specifies the cases in which, and in which alone, the defendant must swear to the truth of his plea: *Merrington v. Beckett* (a); *Smith v. Backwell* (b); *Edwards v. Greenwood* (c). In *La Forest v. Langan* (d), an action was brought upon a bill of exchange, and the defendant pleaded that the bill was outstanding in the hands of a third person. An application was made, upon affidavit, to set aside the plea as false, and letters of the defendant, requesting time for payment, were also relied on. The motion was refused, upon the ground that the plea was one upon which a distinct issue might be taken, and that its truth could not be tried on affidavit. If a plea is false in fact, and also puts the plaintiff in a difficulty as to the mode of replying, it may be set aside: *Levy v. Railton* (e). The defence in this case is a single one, upon which issue can be taken, and there is nothing improper upon the face of it. The cases cited on the other side are all consistent with the motion being refused, but *La Forest v. Langan* is precisely in point.

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M. Morris replied.

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We cannot accede to this application. As far as I can collect the intention of the Court, from the note of the case of *Leathly v. Carey*, in the *Appendix* to the 8th vol. of the *Irish Common Law Reports*, p. 1, I infer that it was not the intention of the Court to determine, in a summary way, the truth or falsehood of a plea on affidavit. If, by the rule there made it was intended so to decide, I should say at once that I could not follow that decision as an authority. But what the Court there did was to grant a conditional order to set aside the defence, with liberty to the defendant to show cause; and that liberty was given to him upon the terms of paying costs. The

(a) 3 Dow. & R. 231.

(b) 4 Bing. 512.

(c) 5 Bing. N. C. 477.

(d) 4 Dow. P. C. 642.

(e) 14 Q. B. 418.

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REILLY. inference which I should be disposed to draw from a rule in that form, and from the short note of the judgment of Mr. Justice Crampton, is, that the Court considered that there was something in the form of the defence, and in the reference to the indorsement upon it, which made the defence embarrassing; that the defence being thus irregular in form, it became necessary for the defendant to amend it; and that the Court, upon what appeared before it, refused to allow an amendment, and determined to set aside the defence, unless, on showing cause against the conditional order, it should appear, by affidavit, that the defendant had, in fact, a defence upon the merits to try in the action; and the rule made in the case of *Smyth v. Scott* (a) appears to have been made on the same grounds.

We have been called upon to follow the rule made in *Leathly v. Carey*, as an authority. No one has a stronger conviction than I have (as more than once expressed from this Bench) of the importance of abiding by a judgment once pronounced, after discussion and consideration, upon a point distinctly raised for decision. But this does not apply to the exercise of mere discretionary powers. These, as I apprehend, are conferred on the Court for the express purpose of their being applied with a view to what appears to the Court to be right and just in the particular circumstances before it. If, in the exercise of the discretion which the law, in certain cases, so confers upon Judges, they occupy themselves in considering, not how *they* ought best to exercise it according to the requirements of the case before them, but how they may trace analogies, more or less remote, between the case before them and some former case, which, in its circumstances, it more or less resembles, they virtually abjure the discretion which the law casts upon them, and make for themselves a new set of fetters, rendering almost useless, in many cases, the possession of discretionary powers. In the present instance, even if authority ought to bind us, there is none to warrant the order we are called upon to make. The facts are these:—The action is brought upon a promissory note, by the indorsee against the maker. The defendant, in a single defence, traverses the making of

(a) 8 Ir. Com. Law Rep., App., xxxv.

the note. Upon the face of that defence there is nothing embarrassing. Does the Common Law Procedure Act warrant us in trying the truth of it on affidavits? If it does, then, in every case in which the plaintiff, by affidavit, disputes the defence, the defendant may be compelled to verify his defence by affidavit. The Act of Parliament *might* have so enacted. It was, as is well known, once proposed to provide, by law, that every defence should be verified by affidavit. But the Legislature have abstained from so providing; and such affidavit is required only in the case of dilatory defences; and in the case of several defences within the 57th, and not within the 58th, section of the Common Law Procedure Act. The Act thus prescribing the cases in which the defendant is, or may be, required to verify his defence, it follows that he ought to be at liberty to plead, without a verifying affidavit, a single defence, subject to its being set aside, under the 83rd section, if it be so framed as to prejudice, embarrass or delay. The Act, it may be said, does not take away (in cases for which it does not provide) the power of the Court to regulate and control its own proceedings. That is so. But if we yield to applications such as the present, what must be the result? In the first place, we shall abrogate the privilege which the Common Law Procedure Act manifestly contemplated, namely, that the defendant should be at liberty to put in, without verifying it, a single defence, provided it be not "so framed as to prejudice, embarrass or delay the fair trial of the action." In the next place, we shall, in effect, determine that in every instance where the plaintiff shall dispute the defence, the question in controversy may be decided by the Court, on motion, without the intervention of a jury, and without appeal. Between what is clearly right upon the one side, and clearly wrong upon the other, there must be many degrees of strength and weakness of evidence; and upon that evidence the Court would be called upon to exercise summary jurisdiction. The result would be a class of motions and a kind of litigation quite new, and leading to great expense and litigation. About two centuries at least have passed since bills of exchange were adopted in our law as part of the custom of merchants. No recorded instance has been found in which, during all that time, such an application as the pre-

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sent has been made, much less has succeeded. Several cases have been cited, in which the Courts in England have refused to set aside pleas, good upon the face of them, on the allegation that they were, in fact, unfounded. In the present case the plea (as to its form) is framed in accordance with the provisions of the Act. There is no enactment of the statute, and there is no rule of Court, which requires or suggests that we should interfere with it. There is a rule of Court which leads to the opposite inference. The 43rd General Order prescribes the course to be adopted, where a defendant pleads, as matter of his defence, a judgment recovered (a kind of defence formerly in common use as a sham plea); and that Order provides a summary remedy, by application to the Court, when, by reference to its records, it is found that the defence is false, the judgment pleaded having no existence. This Rule, prescribing a specific mode of dealing with one class of defences, on the very ground of their falsehood, such falsehood being proved, not on conflicting affidavits, but by reference to the records of the Court, affords some reason to infer that it was not intended that in other cases the Court should discuss and determine the truth of a single defence, regular in its form, on conflicting affidavits.

I have thought it necessary to say thus much in consequence of some observations made on some of the cases referred to in the argument.

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Where any
one of several
defendants
named in a

THIS was a motion on behalf of James Tyrrell, one of the defendants named in the writ, to set aside the order of the 14th of January writ of summons and plaint has not been served, and there are other defendants, upon whom service might have been, but was not, effected, the renewal of the writ, on the ground of the non-service of such one defendant, will prevent the operation of the Statute of Limitations in favour of such other defendants.

1860, so far as regarded the said James Tyrrell, and that the plaintiff might be restrained from relying on such order in answer to any defence of the Statute of Limitations pleaded by the defendant, upon the ground of suppression and concealment from the Court of the fact that the writ had not been served upon the defendant James Tyrrell, and Dominick Marquis and William Curran (since deceased), or either of them; and upon the ground that the Court, when pronouncing said order, had not been satisfied, by affidavit or otherwise, that reasonable diligence, or any diligence, was used, to effect service of said writ upon the said defendant James Tyrrell, Dominick Marquis and William Curran, or any or either of them.

It appeared that the summons and plaint in this case, which was in trespass for false imprisonment, issued on the 4th of February 1857. The defendants named in the summons and plaint were George Capes, John Stewart, James Tyrrell, Dominick Marquis and William Henry Curran. Capes and Stewart were resident out of the jurisdiction. The writ was renewed, at intervals of six months from that date to the 14th of January 1860, when the order for renewal was made, which the defendant Tyrrell now sought to set aside. The affidavit of Mr. Tyrrell, grounding the motion, stated that the alleged cause of action arose in 1853, and that the Statute of Limitations was a conclusive bar to the suit. That, in the year 1854, the plaintiff had brought his action for the same cause as that now complained of, against the defendants Tyrrell and George Capes and John Stewart, in which he had been nonsuited. That he (Tyrrell) was not served with a copy of the summons and plaint in the present action until the 19th of May 1860, and that this service was the first intimation he had of the action. That the affidavit upon which the order of the 14th of January 1860 had been obtained was confined to efforts made to serve the defendants Capes and Stewart only, and did not disclose the fact that Tyrrell had not been served, and that service might have been effected upon him without any difficulty, as he was resident in Ireland during the entire period from the issuing of the writ, and that service might also have been effected upon the defendant Marquis and on Curran, previous to his death.

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The affidavit of the plaintiff, upon which the order of the 14th of January 1860 was obtained, stated the issuing of the writ against the defendants Capes and Stewart, and applications by the plaintiff to them, through the Post-office, to name some person to appear for them in this country; and also applications to Mr. Tyrrell and his partner, to know if they were authorised to appear for said Capes and Stewart; and the affidavit also deposed to proceedings in this country, in the year 1851, by said Capes and Stewart, against the plaintiff, carried on through James Tyrrell.

G. A. May, in support of the motion.

The writ of summons and plaint was issued on the 4th of February 1857, and the cause of action accrued in 1853. Mr. Tyrrell was resident within the jurisdiction, and might have been readily served during the entire period from 1857 to the present. He was not in fact served until May 1860; and he is not to be deprived of the benefit of a plea of the Statute of Limitations, because the plaintiff chose to include in his plaint, as defendants, persons resident out of the jurisdiction. The question turns upon the construction of the 28th section of the Common Law Procedure Act 1853. That section enacts that the writ of summons and plaint shall be in force, for the purpose of service, from the day of its date; but if any defendant named in it has not been served, the writ may be renewed, at any time before its expiration, for six calendar months from the date of the renewal. If the section stopped there, it might be contended that the renewal of the 14th of January 1860 kept the writ alive against Mr. Tyrrell; but then comes the proviso which overrides the entire preceding part of the section:—"Provided always, that no writ of summons and plaint "so renewed shall be available to prevent the operation of any "statute whereby the time for the commencement of the action "may be limited, unless such renewal shall be had by leave of "the Court or a Judge, on an affidavit, to satisfy the said Court "or a Judge that reasonable diligence was used to effect service "thereof." It is submitted that the rational and just construction of the section, as controlled by that proviso, is that, if any defendant

could by reasonable diligence have been served, the renewal of the writ shall not deprive him of the protection of the Statute of Limitations.

He also referred to the 11th section of the Mercantile Law Amendment Act, 19 & 20 Vic., c. 97.

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W. A. Exham, contra.

The complaint of Mr. Tyrrell is, that he has not been served six or eight times.—[FITZGERALD, B. You must argue that the words “any defendant,” in the 28th section, mean “any one of several defendants.”]—The true construction of the section is that, where any one of several defendants, however numerous the others may be, has not been served, the Court will renew the writ; but, by the proviso, the renewal of the writ is not to prevent the operation of the Statutes of Limitation, unless it be shown by affidavit that such service (that is, the service of any one defendant mentioned in the prior part of the section) could not, by reasonable diligence, have been effected. That construction makes the practice under this section conformable to that which existed at the passing of the Act, and to the rule in England, under the 11th section of the Common Law Procedure Act there, 15 & 16 Vic., c. 76.

Cur. ad. vult.

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In the case of *Dickson v. Capes*, an order was made, upon the 14th of January 1860, upon the affidavit of the plaintiff, that the plaintiff be at liberty to renew the writ of summons and plaint, for six months from the date of the order. An application was made to set aside that order, by the defendant Mr. Tyrrell. The order was obtained upon the affidavit of the plaintiff, which, together with the summons and plaint, then before the Court, disclosed this state of facts, that he had, upon a former occasion, brought an action against the three defendants, Capes, Stewart and Tyrrell, in which a nonsuit had been entered, and that, on that occasion, those three parties had appeared, and taken defence. He commenced the present action on the 4th of February 1857. Repeated renewals were obtained in the office, within the period in which

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On the affidavit upon which the order was made, a full statement of those circumstances, viz., that those two defendants were out of the jurisdiction, and that the defendant Tyrrell was within the jurisdiction, was made to the Court. The allegation amounted to this, that the parties out of the jurisdiction could not be served; and a correspondence was shown, from which it appeared that efforts had been made to induce those defendants to appoint some person to appear for them in this country. Upon the face of the affidavit, it was perfectly clear that efforts had been made, antecedently to the application which resulted in the order of the 14th of January 1860, to obtain the appearance of those defendants in this country. I mention that, because it appears to me that there are no grounds before us for supposing that this writ is used oppressively against the defendant Mr. Tyrrell. If that did appear, I am far from saying that we might not exercise a jurisdiction to set it aside, as an abuse of the process of the Court. I do not say we would; but I think it very probable that, if that had appeared, we should have refused an order to renew the writ.

In this state of things, we are now called upon to set the order of the 14th of January 1860 aside, upon the ground that it issued improvidently, and that the Court had no jurisdiction to make it. The order was made under the 28th section of the Common Law Procedure Act 1853, which enacts that "No writ of summons
 "and plaint shall be in force, for the purpose of service, for more
 "than six calendar months from the day of the date thereof,
 "including the day of such date; but, if any defendant therein
 "named shall not have been served therewith, the original or
 "duplicate writ of summons and plaint may be renewed, at any
 "time before its expiration, for six calendar months from the date
 "of such renewal, and so from time to time, during the currency
 "of the renewed writ, by being marked with the common seal
 "of the Superior Court, with a memorandum, signed or initialed
 "by the officer, of the date of the day, month and year of such
 "renewal." Then comes this proviso:—"Provided always, that

“no writ of summons and plaint, so renewed, shall be available
 “to prevent the operation of any statute whereby the time for
 “the commencement of the action may be limited, unless such
 “renewal shall be had by leave of the Court or a Judge, on an
 “affidavit, to satisfy the said Court or a Judge that reasonable
 “diligence was used to effect service thereof.”

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The argument on the part of Mr. Tyrrell is, that the expression “if any defendant therein named” ought to be construed to mean that, if any one defendant could have been served, however numerous his co-defendants may have been, against *that* defendant the Court ought not to renew the writ; and the question of construction arises, whether that is the true meaning of that phrase in the 28th section, or whether it means that, when any defendant has not been served, because he cannot be served, although reasonable diligence has been used to effect service upon him, there, however numerous the other defendants may be, the Court ought to renew the writ?

With a view to this question, which has been a good deal discussed, it is necessary to consider what the law was at the time the Common Law Procedure Act was passed; and that brings us to the consideration of the law when the Irish statute 3 & 4 *Vic.*, c. 105, was passed, analogous to the English statute 2 *W.* 4, c. 39.

The course of practice in England, as laid down in 1 *Tidd*, p. 162, was this:—where the writ issued, and there was a return of *non est inventus*, the writ having given to the Court possession of the cause, the plaintiff was entitled to enter continuances; and so, at any distance of time, to make the writ valid against any of the defendants named in it. That was nothing but a fiction of law; because, in point of fact, no subsequent writs were ever issued. It was thought right to abolish those fictitious proceedings; and, accordingly, by the 2 *W.* 4, c. 39, in England, and the 3 & 4 *Vic.*, c. 105, in Ireland, section 7, it was enacted:—“And in order to prevent
 “the operation of any Statute of Limitation in bar of the cause of
 “action of any plaintiff, in cases in which such cause of action would be
 “barred unless a writ or process issued, and was continued for that
 “purpose, that every writ or process may be continued by *alias* and

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" *pluries*, as the case may require, if any defendant therein named
 " may not have been arrested or held to bail thereunder, or served
 " therewith; provided always, that no first writ shall be available
 " to prevent the operation of any statute whereby the time for the
 " commencement of the action may be limited, unless the defend-
 " ant shall be arrested, or held to bail thereunder, or served there-
 " with, or proceeding to or towards outlawry shall be had thereupon,
 " or unless such writ, and every writ (if any) issued in continuation
 " of a preceding writ, shall be returned *non est inventus*, and entered
 " of record within one calendar month after the expiration of the
 " return of such writ or process, including the day of such expira-
 " tion; and unless every writ issued in continuation of a preceding
 " writ shall be issued within one calendar month after the expira-
 " tion of the preceding writ, and shall contain a memorandum in-
 " dorsed thereon, or subscribed thereto, specifying the day of the
 " date of the first writ, such return of *non est inventus* to be made
 " in bailable process (in case such bailable process shall be ordered
 " to issue as aforesaid), by the Sheriff or other officer to whom such
 " writ shall be directed, or his successor in office; and in process
 " not bailable, in case of non-service thereof, to be made by the
 " plaintiff, or his attorney suing out the same, and signed by him;
 " and in case such bailable process shall be so returned *non est in-*
 " *ventus*, then, for such purpose of preventing the operation of such
 " Statute of Limitations, the same may be continued by *alias* and
 " *pluries* writ not serviceable, to be continued and returned in
 " manner aforesaid."

It is plain, upon the language of the section, and it has been so universally understood in practice, that the words "if any defendant therein named" meant any one of a number of defendants named. Under that Act the course was this, that whereas before, the party had only the trouble of issuing a single writ, obtaining a return from the Sheriff, and thus giving the Court possession of the cause, and at any distance of time entering continuances, which were fictions of law, this Act incumbered the plaintiff with the necessity of issuing successive writs. Then came the Common Law Procedure Act in England, 15 & 16 Vic., c. 76, and that Act repealed the

provisions of the 2 *W.* 4, c. 39, relating to *alias* and *pluries* writs, and provided by the 11th section—"No original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date; but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed, at any time before its expiration, for six months from the date of such renewal, and so, from time to time, during the currency of the renewed writ, by being marked with a seal, bearing the date of the day, month and year of such renewal; such seal to be provided and kept for that purpose at the offices of the Masters of the said Superior Courts, and to be impressed upon the writ by the proper officer of the Court out of which such writ issued, upon delivery to him, by the plaintiff or his attorney, of a *præcipe*, in such form as has heretofore been required to be delivered upon the obtaining of an *alias* writ; and a writ of summons, so renewed, shall remain in force, and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

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The words there are, "if any defendant therein named;" precisely the words of the 2 *W.* 4, c. 39, and of the 3 & 4 *Vic.*, c. 105. The only change made by that section of the English Common Law Procedure Act was, to take away the necessity of issuing *alias* and *pluries* writs, and to substitute the renewal (obtained for the asking) of the original writ, whenever any defendant named in it had not been served with the process.

In this country a somewhat different enactment has been made, by the addition of a proviso, but in every other respect the provision is substantially the same. If the section (28th) had stopped where the proviso commences, there can be no question that the renewed writ, without any application to the Court, would have had the effect of preventing the bar of the statute. But then comes the proviso:—
 "Provided always, that no writ of summons and plaint, so renewed, shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited,

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“ unless such renewal shall be had by leave of the Court, or a Judge, on an affidavit, to satisfy the said Court, or a Judge, that reasonable diligence was used to effect service thereof.” What service? It would be a most unreasonable construction to give to that word any other meaning than that service which is mentioned in the preceding part of the section. The Act gives a right to renew, without any special application to the Court, for all purposes save the purpose of the Statute of Limitations; and when it provides that that shall not be saved, unless the renewal shall be had by leave of the Court, or a Judge, on an affidavit satisfying the Court that reasonable diligence was used to effect service, it must mean that service the non-effecting of which gives the right to renew the writ at all. In effect, the difference between the two legislations is only this, that our Act casts upon the plaintiff, in the first instance, before he can obtain the renewal of his writ, for the purpose of saving the bar of the Statute of Limitations, the necessity of showing that due service could not, by reasonable diligence, have been made; whereas in England, the Act leaves to the plaintiff, at his own option, to renew the writ. But I would suppose that in England, if it were proved to the Court that a party abstained from serving when he might have served, and that he used the process for the purpose of keeping for ever a demand hanging over another defendant, who could be served, that defendant would obtain the intervention of the Court to protect him against such injustice.

I believe that I have stated the true view of these Acts. If that be so, let us see whether there are any grounds for setting aside the order of the 14th of June 1860. If it were satisfactorily shown to us that these absent parties could be brought within the jurisdiction of the Court, or that they were in Ireland at some time when they could have been served, and where the plaintiff voluntarily abstained from serving them, it would thus appear that the order had been obtained upon a perversion of facts, and we might set it aside as obtained by deception and fraud practised on the Court. But there is nothing to show that this is not a *bona fide* proceeding, and that the statement is not perfectly true, that those

parties *had* not been served, because they *could* not, due diligence to effect service having been used. T. T. 1860.

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It appears to me, therefore, that the order was right, and ought not to be rescinded. I will take leave to add, that I dissent from the argument that the renewal is a matter within the arbitrary jurisdiction of the Court. In my judgment, the discretion of the Court is bound by the statute, and the plaintiff is entitled to a renewal of his writ, if he satisfies the Court, not that it is a proper thing to renew the writ, not that the action is a proper one—a matter with which, in dealing with a suitor's process on such a question as this, the Court, in my judgment, have nothing whatever to do; but that reasonable diligence was used to effect the service upon the persons who had not been served. That is the matter, satisfactory proof of which, by affidavit, the statute requires, as the condition of obtaining leave to renew.

A good deal of argument was applied to show that this case ought to be regarded as distinct from a case of contract. Let us see how the law stands, with respect to contract and *tort*, and in reference to the question now before us. It has been long determined, that when one of several *plaintiffs* resides within, and the others reside without, the jurisdiction the, Statute of Limitations, notwithstanding the absence of some, applies; for this reason, that the plaintiff within the jurisdiction may bring his action in the name of all. The 6 *Anne*, c. 10, s. 17, in this country, corresponding with the 4 *Anne*, c. 16, in England, in effect enacted that, wherever there were two co-contractors, and one of them out of the jurisdiction, there was no necessity to issue *alias* and *pluries* writs, to keep the statute alive against them. That appears from *Fannin v. Anderson* (a). But the case was different in reference to co-defendants. Lord Denman, in dealing with such a state of things, in reference to several defendants, says:—"With respect to defendants, however, the reason does not apply. The plaintiff cannot bring the absent defendants into Court, by any act of his; and, therefore, if he be compelled to sue those who are within seas within six years, without joining those who are absent, he may possibly recover against

(a) 7 Q. B. 811.

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 DICKSON " who are absent. On the other hand, if he sues out a writ against
 v. " all, and either continues it, without declaring, or proceeds to ou-
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 " are within seas, he is placed in precisely the same situation as if
 " the statute of *Anne* had never passed, and is obliged to incur
 " fruitless expense, the avoiding of which seems to have been
 " the object of the statute of *Anne*. That statute cannot have
 " been passed in order to keep the plaintiff's remedy alive; for
 " such object was easily attained before the statute, by suing out
 " a writ and continuing it." That shows that the case of one being
 within, and the other without the jurisdiction, was just the case
 indicated by the 2 W. 4, c. 39, in the words, " if any defendant
 therein named."

It is said that the principle upon which Lord Denman acted does not apply to the case of joint *tort-feasors*. That is a mistake. It is plain that any number of *tort-feasors*, who join in one *tort*, may be joined as co-defendants. Any one of them may be sued for the *tort*, and there may be a recovery against one; but if the *tort* be joint, and there be a recovery against one, that recovery is a bar to any future action against the others. That places the defendant within the jurisdiction, and the defendant out of the jurisdiction, who are charged with a joint *tort*, in the same position, in reference to the question with which we are dealing, as if they were joint contractors. What is the cause of action here? It is trespass for false imprisonment. It is plain, if the action proceeds against Mr. Tyrrell alone, and the plaintiff recovers against him, the other two defendants will be protected by that recovery. That is exactly the condition of things contemplated by Lord Denman, in his judgment in *Fannin v. Anderson*. That is the view which I take of the case now before the Court. I, therefore, think that this motion must fail. It is said that there is no remedy. That is a mistake. This writ has now been served upon Mr. Tyrrell, and the plaintiff will be bound to proceed, and to file his plaint, unless the Court relieves him from the obligation of doing so, by giving him further time to

file it. The case of *Morton v. Grey* (a) decided that, where there are two defendants, one of whom has been served, and the other not, the plaintiff must obtain time to declare, in the same manner as when there is only one defendant; and where a party proceeded to declare, without that leave, after the time within which he ought to have declared, the Court set aside the proceedings.

These are the reasons which occur to my mind upon this subject. I think the motion should be refused with costs.

FITZGERALD, B.

I concur in the judgment, on the ground that the order of the 14th of January 1860 was one which the Court had jurisdiction to make, and that there would be a difficulty in putting the plaintiff in the position in which he was when that order was made, though I entertain great doubt whether the order ought originally to have been made.

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W. A. Exham then applied for an order to serve the defendant Capes, out of the jurisdiction, or to authorise substitution of service through the Post-office. He contended that the order might be made under the 34th section of the Common Law Procedure Act 1853, which enacts:—"That in case it shall be made to appear, "by affidavit, to the satisfaction of the Court in which the action "is attached, or, in Vacation, of any Judge of any of the said Courts, "that any defendant in any summons and plaint, the cause of action "in respect of which the same shall have issued having arisen "within the jurisdiction of the Court, has not been served with "the writ of summons and plaint, in the manner hereinbefore prescribed, and has not, according to the exigency thereof, appeared "and taken defence to the action, and that due and proper means "were used to serve such writ, in the manner aforesaid, or that "such defendant is out of the jurisdiction of the Court, and can

(a) 9 B. & C. 544; and see *Wynne v. Clarke* (5 Taunt. 649), and the other cases cited: 1 Tidd's Prac. 422.

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Nov. 10.

The Court has no power to authorise service of a defendant out of the jurisdiction, unless by substitution in the manner specified in the 34th section of the Common Law Procedure Act 1853.

T. T. 1860. *Eschequer.*
 DICKSON
 v.
 CAPES. "be properly served through or upon any agent or representative,
 "or any manager of the real or personal estate of such defendant
 "within such jurisdiction, or has removed to avoid service, or any
 "other good and sufficient grounds, it shall be lawful, upon an ap-
 "plication made at any time while the said writ shall be in force,
 "for such Court or Judge to authorise such substitution of service
 "through the Post-office, or in such manner and with such extension
 "of time for service and defence as to them or him shall seem meet."
 If any "good and sufficient grounds" appear, the Court may di-
 rect service out of the jurisdiction.—[FITZGERALD, B. "Good and
 sufficient grounds" mean grounds of the same character as those
 enumerated.]—In England, in a similar case, the plaintiff might
 issue a marked writ, and proceed under the 18th section of the
 English Common Law Procedure Act, 15 & 16 Vic., c. 76—
 [FITZGERALD, B. There is no such provision in this Act.]—Unless
 the words "other good and sufficient grounds" confer it.

Per Curiam.—No rule.

M. T. 1860.
 Nov. 10. *W. A. Exham* renewed the application, and referred to the
 language of the 31st section:—"The writ of summons and plaint
 "may be served in any place or county in which the defendant may
 "be found within the jurisdiction of the Court, and not out of said
 "jurisdiction, unless by an order of the Court or Judge." That
 section shows that the Legislature contemplated a service out of
 the jurisdiction, by order of the Court.—[HUGHES, B. The Court
 never had power to order service out of the jurisdiction before this
 Act. You say that the saving of a right which did not exist confers
 the right.]—Yes.

FITZGERALD, B.

The Legislature gave the power of serving out of the jurisdic-
 tion, by reason of the order of the Court, in certain cases. If you
 show that this is one of those you may succeed, but you fail in that.

No rule.

M. T. 1860.
Eschequer.

POWELL

v.

ATLANTIC STEAM NAVIGATION COMPANY.

Nov. 8, 9, 23.

THIS was an application that the *postea* in this cause, as returned into and lodged in the proper office, might be amended, by inserting in the finding on the seventh issue the word "not," between the words "did" and "receive," and by inserting in the tenth issue the word "not," between the words "had" and "the."

The amendment of an error in a *postea* which has been filed is to be made by the Court on motion, grounded on the certificate of the Judge who tried the case.

The plaintiff in this case had been a passenger from New York to Galway in one of the vessels of the defendants, The Atlantic Steam Navigation Company, and had brought the present action to recover a sum of £62. 6s. 10d., the value of certain articles of luggage alleged to have been lost by the defendants during the voyage. The summons and plaint contained five paragraphs; four of which were founded upon an alleged breach of contract and negligence in the defendants. The fifth was a count in trover. The defendants pleaded three defences to each count of the summons and plaint; and lastly, a defence to all the causes of action. Sixteen issues were eliminated from these pleadings. The case was tried before Serjeant Howley, at the Summer Assizes of 1860 for the county of Sligo, when the jury found for the plaintiff on the third, sixth, ninth, twelfth, fifteenth and sixteenth issues. The findings on the other issues were in favour of the defendant. The seventh and tenth issues, as settled, were as follows:—"Seventh; whether the defendant received the said box or trunk in the third paragraph mentioned, as therein alleged? Tenth; whether the defendants had the care or custody of the said box in the fourth paragraph of the plaint mentioned, as therein alleged?" The *postea* having been filed, it was discovered by the defendants' attorney that the findings upon the seventh and tenth issues, which had been found for the defendants, stood as follows:—"Seventh;

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"that defendants *did receive* the box or trunk in third paragraph mentioned, as therein alleged. Tenth; that the defendants *had* "the custody of the box in fourth paragraph of the plaint mentioned, "as therein alleged." Upon the 6th of November an application was made to Serjeant Howley to amend the *postea*, which he refused to entertain, upon the ground that it had been filed. The present motion was then instituted. Affidavits were made in support of the motion, by the defendants' attorney and his clerk, from which it appeared that the finding upon the seventh and tenth issues was in favour of the defendants.

P. Blake (with him *W. J. Sidney*), in support of the application.

Our right to have the *postea* amended is clear; and the only difficulty is, as to the form of the order, and the tribunal to which the application should be made. The amendment of a *postea* is the peculiar province of the Judge who tried the case: *Anonymous* (a). In the present instance, however, the *postea* has been filed, and the learned Judge has, for that reason, refused to amend it. In *Guinane v. The Hope Insurance Company* (b), it appears that the amendments were first made by the Judge who tried the case, and afterwards sanctioned by the Court on motion. That case, which was decided in this Court, is a direct authority for the present motion.

M. Morris, contra.

Cur. ad. vult.

FITZGERALD, B.

Nov. 9.

We have looked into this case of *Powell v. Atlantic Steam Navigation Company*, and have communicated with my LORD CHIEF BARON, and we have also been furnished with a copy of the order in *Guinane v. Hope Insurance Company*, from which it appears that the Court itself, upon the certificate of Serjeant Howley, made the order directing an amendment of the *postea*. But we are also of opinion that we cannot do that, without something conformable to a certificate of the Judge; we shall, therefore, let this motion stand

(a) 3 Ir. Com. Law Rep. 119.

(b) 7 Ir. Jur. 119.

for a week, the defendants to be at liberty to make such application as they may be advised, to Serjeant Howley.—Order: “It is ordered “by the Court that this motion do stand over for a week; the said “defendants being in the meantime at liberty to make such application to Mr. Serjeant Howley, the learned Judge who tried this case, “as they may be advised, due notice of any such to be given to “the plaintiff.”

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An application having been accordingly made to Serjeant Howley, he gave the following certificate:—“I hereby certify that, “at the trial of this cause, before me, at the last Assizes of Sligo, “the findings of the jury on the seventh and tenth issues were in “favour of the defendants; and that in transcribing the postea on “the record, the word “not” was inadvertently omitted, and should “have been inserted between the words ‘did’ and ‘receive’ in “the finding on the said seventh issue, and between the words “‘had’ and ‘the’ in the finding on the tenth issue.”

On this day *P. Blake* mentioned that they had procured the certificate of Serjeant Howley, to the effect above stated, and their Lordships thereupon directed the postea to be amended, pursuant to the Judge’s certificate.

Nov. 23.

HUTCHINS v. VAUGHAN.*

H. T. 1861.
Jan. 14, 16,
17.

THIS was an ejectment for non-payment of rent. The case was tried before FITZGERALD, B., at the Summer Assizes for the county

Ejectment for
non-payment
of rent cannot
be sustained

under the Ejectment Statutes, upon an article, minute or contract in writing, executed by the tenant, and not by the landlord, though it ascertains the rent, and the lands have been enjoyed under it.—[FITZGERALD, B., *dissentiente*.]

* Before PIGOT, C. B., and FITZGERALD and HUGHES, BB.

It has been thought desirable to report this case, notwithstanding the recent change in the law, as an appeal is pending; and there is some doubt how far the late Act (23 & 24 Vic., c. 154) applies to existing contracts.—REP.

H. T. 1861. of Cork. The plaintiff proved an instrument, dated the 9th of
Eschequer.
 HUTCHINS December 1848, by which he purported to demise to the defendant
 v. the lands comprised in the ejectment, at an annual rent of £147. 4s.
 VAUGHAN. It was also proved that the defendant occupied and paid rent under
 this agreement. The document, when produced at the trial, appeared
 to be executed by the tenant only. The defendant's Counsel then
 submitted that ejectment for non-payment of rent could not be
 maintained upon such an instrument. His Lordship, however, was
 of a different opinion, and directed a verdict for the plaintiff, reserv-
 ing liberty to the defendant to move to change that verdict into a
 verdict for him, if the Court should be of opinion that the ruling
 was wrong.

A conditional order having been obtained to enter a verdict for
 the defendant, pursuant to the leave reserved—

H. E. Chatterton (with him *W. A. Exham*) showed cause.

Serjeant *Sullivan* and *D. C. O'Riordan*, contra.

The following authorities were referred to :—*Foot v. War-*
ren (a); *Watson v. Clooney* (b); *Warner v. Willington* (c); *Smith*
v. Neale (d); *Jack d. Thompson v. Home* (e); *Crofton v. Shol-*
dice (f); *Grey v. Pearson* (g); *Chadwick v. Clarke* (h); *Pitman*
v. Woodbury (i); *Swatman v. Ambler* (k); *Jack d. Warner v.*
Martin (l); 5 G. 2, c. 4; 25 G. 2, c. 13; 8 G. 1, c. 2; 2 *For-*
Land. and Ten., pp. 1137, 1138.

Cur. ad. vult.

Their Lordships, differing in opinion, delivered judgment *seriatim*.
 HUGHES, B.

Jan. 17. This is an ejectment for non-payment of rent, brought by the
 plaintiff for the recovery of certain lands in the county of Cork.

(a) 10 Ir. Com. Law Rep. 1.

(c) 3 Drew. 523.

(e) 1 Jebb & S. 440.

(g) 6 H. L. Cas. 61.

(i) 3 Exch. 4.

(b) 1 Ir. Com. Law Rep. 58.

(d) 2 C. B., N. S., 67.

(f) 5 Ir. Com. Law Rep. 152.

(h) 1 C. B. 700.

(k) 8 Exch. 72.

(l) 2 Jebb & S. 424.

The action was tried before Baron FITZGERALD, at the last Assizes for the county of Cork, and, under his direction, the jury found a verdict for the plaintiff; but the Court reserved liberty to the defendant to move to change that verdict into a verdict for the defendant, if this Court should be of opinion that the direction so given was wrong in point of law. The question now comes before us upon the plaintiff showing cause against a conditional order obtained by the defendant, that a verdict should be entered for him. The plaintiff produced and proved at the trial a certain instrument, bearing date the 9th day of December 1848, and purporting to have been made between the plaintiff and defendant, whereby the plaintiff demised, or purported to demise, to the defendant, the lands in question, for a term of twenty-one years, at the rent of £147. 4s. That document was executed by the defendant, but was not executed by the plaintiff; and the question that arose, and upon which our opinion is now required, was, can an ejectment for non-payment of rent be sustained where the instrument by which the rent is ascertained, and under which the premises have been enjoyed, was executed by the tenant only, and was not executed by the landlord?

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It is admitted that this action cannot be sustained, unless it comes within the provisions of the 25 G. 2, c. 13. The 2nd section of that statute recites that "Several lands, tenements and hereditaments, in divers parts of this kingdom, are enjoyed under articles, minutes or contracts, in writing, whereby the rent payable for the same is ascertained, but the said articles, minutes or contracts do not contain an actual demise; and, by the several statutes now in force for preventing of frauds committed by tenants, the landlord, and those claiming under him, cannot bring an ejectment for the recovery of such land so enjoyed;" and it therefore enacts, "That where any article, minute or contract in writing, is or shall be made, of any lands, tenements or hereditaments, and the rent payable for the same ascertained by the said article, minute or contract, and the person or persons to whom such article, minute or contract is or shall be made, or any deriving from, by or under him, her or them, hath or have enjoyed, or shall enjoy, the said

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"lands, tenements or hereditaments, under the said article, minute or contract, and one whole year's rent or more is or shall be unpaid or in arrear to any landlord or landlords, for the said lands, tenements or hereditaments, such landlord or landlords, or those lawfully claiming by, from or under him, her or them, may bring his, her or their ejectment, and recover the possession of such lands, tenements or hereditaments, so enjoyed, in such and the same manner, to all intents and purposes, as if such article, minute or contract in writing contained an actual demise, and as if a clause of re-entry had been expressly specified therein, and not otherwise." I am of opinion that, having regard only to the terms of that enactment, and the plain grammatical meaning of the language employed, the article, minute or contract in writing, which would enable a landlord to take advantage of that enactment, should not only ascertain the rent payable by the tenant to the landlord, but should have been made by the landlord to the tenant; that is, that if, in a Court of Law, the article, minute or contract in writing is to determine the liability of the tenant, it must also, in a Court of Law, determine the liability of the landlord. The words of the statute are, "to whom such article, minute or contract" (that is, contract in writing) "shall be made." The person to whom it is to be made is the tenant; but it cannot be made to him except by the landlord—it cannot be made by any person except by the landlord; if it is not made by the landlord, it cannot be made to the tenant; and as the instrument in question was not made by the landlord, it was not, in my opinion, made to the tenant; it was made by the tenant, and not by the landlord; and it could not, for any legal purpose, be made by the tenant to himself. This is my opinion of the construction of the 2nd section of the 25 G. 2, c. 13, looking only to the terms of that section. But, upon considering the pre-existing and contemporaneous legislation on the rights and remedies of landlords over tenants, that opinion has been very strongly confirmed. Prior to the enactment of the 25 G. 2, c. 13, a landlord could not proceed by ejectment for non-payment of rent, unless there existed between him and the tenant he sought to evict an instrument, not only

ascertaining the rent, but also operating, in point of law, as an actual demise. Such an instrument could not be an actual demise, in point of law, unless it had been executed by the landlord. No parol acceptance, no act of the landlord, save execution of the instrument, could have conferred upon it the character of a legal demise; and what the law required was, that it should not only be executed by the landlord, but that it should, in its legal character and operation, be an actual demise. Another difficulty had been removed by a prior enactment, viz., the 5 G. 2, c. 4. The 1st section is as follows.—[His Lordship read the section.]—Thus the Legislature provided for minutes or contracts in writing, as well as leases containing an actual demise, but not containing a clause of re-entry. Now, no minute or contract in writing could be an "actual demise," unless it had been executed by the landlord. Its character or quality of "an actual demise" depended not only on its execution by the landlord, but also on its legal significance. It is not every instrument executed by a landlord to a tenant that is an actual demise. An actual demise must be executed by the landlord; but it must also be in a certain form, or have a certain character, to operate as an actual demise. The form and effect are one thing, the execution by the landlord is another and a different matter. The 5 G. 2 having enabled landlords to recover by ejectment for non-payment of rent, where lands were held under instruments called by the Act "minutes or contracts in writing, containing an actual demise, but not containing any clause of re-entry," the 25 G. 2 was enacted. It recites that lands are enjoyed under articles, minutes or contracts *in writing*, whereby the rent payable for the same is ascertained; but the said articles, minutes or contracts (that is, contracts in writing) do not contain "an actual demise." It then refers to the statutes then in force, and the inability of the landlord to bring an ejectment for the recovery of the lands so enjoyed; and it then enacts that, where any article, minute or contract *in writing* shall be made, of any lands, tenements or hereditaments, "and where the rent payable for the same shall be ascertained by the said article, minute or contract," and where the person to whom such article, minute

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or contract (that is, in writing) shall be made, shall enjoy the said lands, tenements and hereditaments, under said article, minute or contract, and a year's rent shall be due, then the landlord shall be at liberty to proceed by ejectment. Assuming, as I have done, that, prior to the 25 G. 2, the law required that the instrument should not only have been executed by the landlord, but should also, in point of law, be "an actual demise," the recital of the Act (25 G. 2) shows that the difficulty to be avoided was, not the execution of the instrument by the landlord, but the technicality arising from the legal operation of the instrument; and the last words of the 2nd section pointedly refer to this, because they provide that the landlord shall be at liberty to bring his ejectment "in such and the same manner, to all intents and purposes, as if such article, minute or contract in writing contained "an actual demise, and as if a clause of re-entry had been expressly "specified therein;" thus recurring to the 5 G. 2, and mentioning, almost in express terms, that which the 5 G. 2 had dispensed with, the clause of re-entry, although it required the instrument to be executed by the landlord, and to be an actual demise. The 25 G. 2 dispensed with the instrument being an actual demise, and also dispensed with the clause of re-entry, but still required, as indispensable, that the instrument should have been executed by the landlord.

I am, therefore, of opinion that the cause shown against the conditional order should be disallowed, and that the verdict should be entered for the defendant.

FITZGERALD, B.

According to the best of my judgment, the cause shown in this cause ought to be allowed. A document purporting to be an agreement for a lease for twenty-one years of the lands in question to the defendant, and dated the 9th of December 1848, was produced by the plaintiff; it was signed by the defendant, but not signed by the landlord. The plaintiff's right to the land as landlord was admitted. It was admitted that the defendants were put into possession of the land in consequence of the agreement; that they had paid the rents

mentioned in it, and on the gale-days therein specified. The single question is, whether the absence of the landlord's signature to this, or the not showing that there was another part of the contract signed by the landlord, disables the plaintiff from recovering in ejectment for non-payment of rent, under the Irish statutes? I am of opinion that it does not. The 2nd section of the 25 G. 2, c. 13, is in these words:—"Whereas several lands, &c., in divers parts of this kingdom, are enjoyed under articles, minutes or contracts in writing, whereby the rent payable for the same is ascertained, but the said articles, minutes or contracts do not contain an actual demise; and whereas, by the several statutes now in force for preventing of frauds committed by tenants, the landlord, and those claiming under him, cannot bring an ejectment for the recovery of such lands so enjoyed; for remedy whereof be it enacted, &c., that where any article, minute or contract in writing is, or shall be, made of any lands, &c., and the rent payable for the same ascertained by the said article, minute or contract, and the person or persons *to whom* such article, minute or contract is, or shall be, made, or any deriving from, by or under him, her or them, hath or have enjoyed, or shall enjoy, the said lands, &c., under the said article, minute or contract, and one whole year's rent or more is, or shall be, unpaid, or in arrear, to any landlord or landlords, for the said lands, &c., such landlord or landlords, &c., may bring his, her or their ejectment, and recover the possession of such lands, &c., so enjoyed, in such and the same manner, to all intents and purposes, as if such article, minute or contract in writing contained an actual demise, and as if a clause of re-entry had been expressly specified therein, and *not otherwise*." By the 3rd section it is enacted, that—"In any trial in ejectment for non-payment of rent, in pursuance of this Act, where one whole year's rent is unpaid, or in arrear, before the service of the summons in said ejectment, *where it shall be necessary* to produce the counterpart of any such article, minute or contract, if it shall appear to the Court that no counterpart was perfected, or, if perfected, that such counterpart is lost, or so mislaid that it cannot be produced and given in evidence upon such trial, then, in such

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H. T. 1861. "case, if the lessee or lessor in such ejectment shall give in evidence
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 v. "copy of *such counterpart*, and the enjoyment as aforesaid of the
 VAUGHAN. "lands, &c., such original article, minute or contract, or a copy
 "thereof, or a copy of the counterpart, shall be of the same force
 "and effect as if the counterpart of such article, minute or contract
 "had been produced and proved; anything in the said former
 "statutes to the contrary notwithstanding."

It is admitted that the document produced in the present case is an article or minute specifying the lands for which the ejectment is brought, and ascertaining the rent payable, so as to charge the defendants, and that it is under their hands; it is admitted that the lands have been enjoyed by reason of it, and on the terms mentioned in it; it is not denied that it is evidence of the contract under which the lands have been enjoyed, in writing under the defendant's hand; but it is said, that this (it not being signed by the landlord) is not enough, without showing that there was a part of the contract in writing, under the landlord's hand. In support of this proposition, it is relied on that the 25 G. 2, c. 13, is to be read as part of the Ejectment Statute code; that the landlord's right to recover under it is in such and the same manner, to all intents and purposes, as if such article, minute or contract in writing contained an actual demise, and as if a clause of re-entry had been expressly specified therein (that is, in such and the same manner as the former statutes provide), and not otherwise. Now, under all the former statutes, it is said, there was necessary a contract in writing, under the landlord's hand, without which there could not have been an actual demise, it having been held that the Irish Ejectment Statutes do not apply to parol demises; and all that this statute dispenses with is the necessity of an actual demise. It is said that, under the earlier Ejectment Statutes, there is a legislative declaration that not only the original but the counterpart of a lease must be shown, which proves how strict the Legislature was in providing that the contract with which it dealt in the Ejectment Statutes should be binding on both parties; and, finally, it was said, that the article, minute or con-

tract of which the statute of 25 *G. 2*, c. 13, speaks is, in terms, a contract made "to" the tenant.

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The earlier Ejectment Statutes are the 11 *Anne*, c. 2 and 4 *G. 1*, c. 5. By the first of them it is provided that, in all cases between landlord and tenant, as often as it shall happen that more than one half year's rent shall be in arrear, and the landlord to whom the same is due has the right by law to re-enter for the non-payment thereof, such landlord shall and may, without any formal demand or re-entry, serve a summons in ejectment for the recovery of the demised premises, which summons shall stand in the place of a demand and re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry and ouster, it shall be made to appear to the Court, by affidavit, or be proved on the trial, in case the defendants appear, that more than one half year's rent was due before the said summons was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then, and in every such case, the lessor in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded, and a re-entry made. The English Act 4 *G. 2*, c. 28, s. 2, is substantially the same with this. The only material alteration made by the 4 *G. 1*, c. 5, was the dispensing with the necessity of proving a want of sufficient distress in cases where more than one year's rent was due. Now, under these statutes, I apprehend it is quite settled that it was sufficient for the landlord, in ejectment against the tenant, or any deriving under him, to show the counterpart of the lease, that is, the part executed by the tenant only, and that without any proof of the original lease, or any notice to produce it. That was decided in the case of *Roe d. West v. Davies* (a), a case on the English Act 4 *G. 2*, c. 28. The next statute material to be considered is the 8 *G. 1*, c. 2, which, after reciting the Act of the 4 *G. 1*, and reciting that several artifices had been made use of to evade the intent of the statute, "particularly by taking defence to such ejectment in the name of persons not deriving under the lease, whereby the plaintiff is obliged to

(a) 7 *East*, 363.

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 VAUGHAN. “make out the title of his lessor,” for remedy, enacts that, as often as it shall happen that one whole year’s rent, or more, shall be due and in arrear to any landlord, such landlord may bring an ejectment for the recovery of the demised premises, and, on service of the summons in said ejectment, notice in writing shall be given to the person on whom such ejectment shall be served, that such ejectment is brought for non-payment of rent; and if any person or persons shall take defence in such ejectment, and shall appear on the trial, and shall confess lease, entry and ouster, and the plaintiff shall then make due proof of the perfection of the counterpart of the lease by which such rent is reserved, and that his lessor, or those under whom he derives his title, have been in possession of such lands, &c. for three years before service of such ejectment, or shall show any sufficient title to the premises, and it shall appear in evidence at the trial that one whole year’s rent, or more, is due, then the plaintiff shall recover and have judgment in the said ejectment, in such manner, and under such provisions, as is by the former Act directed. This statute it is which makes the great distinction between the Irish and English actions of ejectment for non-payment of rent; it requires that the summons in ejectment shall specify that the ejectment is brought for non-payment of rent, and consequently in Ireland it is held that in such case the landlord cannot recover on any other ground. It was the statute most in use in Ireland. The Act of *Anne* required that more than half a year’s rent should be due, and that there should be no sufficient distress on the land; the statute of 4 *G.* 1 required that *more* than a year’s rent should be due, though it dispensed with the necessity of showing the absence of a sufficient distress. Under this statute it is sufficient that a year’s rent should be due. Under the former statutes it was, as has been seen, sufficient for the landlord to prove the part of the lease executed by the tenants, without proof of the original, or notice to produce it; under this statute it is not only sufficient, but necessary, to produce that part. The principal mischief which the statute sought to remove was the taking the defence in the name of a stranger. When that was done, the landlord was put to strict proof of title against the stranger; neither the original lease nor the coun-

terpart would have been of any avail whatever; the statute makes the same proof by counterpart as would have been available against the tenant and those deriving under him, not only available against them but against the stranger, where a year's rent was due, and the landlord had had a triennial possession. In every case, therefore, in which no more than a year's rent was due, or when defence was taken in the name of a stranger, it was necessary, in order, to avail oneself of the Ejectment Statutes, to proceed on the counterpart, but it was also sufficient. In cases within the 11 *Anne* and 4 *G.* 1, it was sufficient, but not necessary.

The next material Act was the 5 *G.* 2, c. 4, which, by its 1st section, extends the provisions of the previous Acts to the cases of leases, minutes or contracts in writing, *containing an actual demise*, though no clause of re-entry was inserted in them, in such and the same manner, and to all intents and purposes, as if a clause of re-entry had been expressly inserted. The 3rd section enacts that, whereas by the several Acts in force, &c., the lessor, upon the trial in ejectment (not all ejectments) to be brought on the said Acts, must make proof of the perfection of the counterpart of the lease by which such rent is reserved, before he or they can recover, which many times happens to be impracticable, by reason that no counterpart was ever perfected, or, if perfected, has been lost, or so mislaid that it cannot be produced and proved on such trials; and enacts, for remedy, that, on any trial in ejectment for non-payment of rent, in pursuance of this or the former Acts, where one year's rent or more is due before the summons, where (that is, in that class of cases where) it shall be necessary to produce the counterpart of any lease, minute or contract, containing an actual demise, if it shall appear to the Court that no counterpart was perfected, or, if perfected, that such counterpart is lost, or so mislaid that it cannot be produced and given in evidence upon such trial, then, in such case, if the lessor shall give in evidence the original lease, minute or contract, or a copy thereof, or a copy of such counterpart, and that the lessee or lessees enjoyed the lands, &c., under such lease, minute or contract, such original lease, or a copy thereof, or a copy of the

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H. T. 1861. counterpart, shall be of the same force and effect is if the counterpart of such lease, minute or contract had been produced and proved.
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Thus, then, the law stood, up to the time of the Act applying to the present case. Under all the statutes, it was sufficient to prove the part of the contract under the tenant's hand. Without proof of the original, or notice to produce it in evidence, it was necessary to produce the counterpart, or to account for its non-production, by proof that same was executed, or of loss. In none was it necessary to produce the original under the landlord's hand; but whether the non-production of the counterpart was accounted for, the original, or a copy, might be produced, as a substitute for it: but a copy of the counterpart would have been equally available.

Now it may well be that, as all these statutes required that the instruments with which they were dealing should contain an actual demise, which could only be granted and signed by the landlord, it might here be competent for the defendant to show that no such instrument had been in fact signed by him. The question is, what was necessary for the landlord to prove? and that was the part under the tenant's hand only. Then comes the statute of 25 G. 2, which dispenses with the necessity of a contract operating as an actual demise, and which contains similar provisions with that of 5 G. 2, as to counterparts. The only bearing, therefore, as it appears to me, of the antecedent statutes, on it is that, while it continues sufficient for the landlord to produce the part of the contract under the tenant's hand, the necessity of there being a part under the landlord's hand has wholly disappeared; but it is quite sufficient, for the decision of this case, to hold that it is sufficient for the landlord to prove a part of the contract under the tenant's hand. It is true that the statute speaks of an article, minute or contract made to the tenant; but, surely, an article, minute or contract, signed by the tenant, under which the land has been enjoyed, and the rent paid and received, is evidence in writing, against the tenant, of a contract made to him by the landlord.

On these grounds, I am of opinion that the proof at the trial was sufficient to sustain the ejectment, and that the cause shown ought to be allowed.

PIGOT, C. B., concurred with HUGHES, B.

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REIDY v. PIERCE.*

Jan. 28, 29.
 Feb.

THIS was an action of ejectment on the title, for the lands of Knockanebrack, held by Edmond Pierce, under a lease from George Sandes, for a term of twenty-one years. Defence was taken by David Pierce only, who, it was admitted, claimed under Edmond Pierce. The case was tried before Hayes, J., at the Summer Assizes of 1860, for the county of Kerry. At the trial, it appeared that the plaintiff claimed title as statutable mortgagee, having registered a judgment against the lands, pursuant to the provisions of the 13 & 14 Vic., c. 29.

Proof having been given of the defendant's possession of the lands, and payment of rent by him, the attorney of the plaintiff was then examined on his behalf, who produced a certified copy of a judgment obtained by Martin Reidy, the plaintiff, against Edmond Pierce, in the Court of Queen's Bench, for the sum of £98. 9s. 0d.

A creditor, who has registered a judgment against lands, pursuant to the 13 & 14 Vic., c. 29, may maintain ejectment against his judgment debtor, without a previous demand of possession.

A statutable mortgage is an assignment by operation of law, within the meaning of the Sub-letting Act, 2 W. 4, c. 17, and is a good charge on lands held under a lease

prohibiting alienation.—[FITZGERALD, B., *dubitante*.]

The provisions of the 2 & 3 W. 4, c. 87, s. 32, requiring ten days' notice before trial to dispense with the production of the original memorial of a deed, do not apply to the office copy of the affidavit lodged in the Registry-office.

Quare, per PIGOT, C. B.—Whether examined copies of the judgment, the affidavit filed in Court and the office copy lodged in the Registry-office, are not sufficient, or, at all events, *prima facie* proof?

The copy of the document lodged in the Registry-office bore at the foot of it the name "Francis Lacy." The plaintiff's attorney proved that he got the document lodged in the Registry-office from "Francis Lacy," the proper officer of the Law Court, and himself lodged it.

Per PIGOT, C. B.—This amounted to proof that the document lodged in the Registry-office was an "office copy."

Per FITZGERALD, B.—As only a copy of the document lodged in the Registry-office was produced, proof was necessary that the document lodged was, in fact, signed by the officer of the Law Court.

* Before PIGOT, C. B., and FITZGERALD and HUGHES, BB.

H. T. 1861. The witness proved that he compared this copy with the original record, and saw it certified by the officer. He also produced a certified copy of the affidavit filed in the Court of Queen's Bench; and also produced a document, which he stated he compared with the document in the Registry of Deeds Office. This document purported to have, at the foot of it, the name "Francis Lacy." His evidence was that, after lodging the affidavit in the Court of Queen's Bench, he took out a copy of it, and compared it himself, and then lodged it with the proper officer of the Registry of Deeds Office, and that he got that document from Mr. Francis Lacy, the Pleadings Assistant in the Court of Queen's Bench.

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The defendant's Counsel objected to the reception in evidence of the copy of the document lodged in the Registry of Deeds, on the ground that the ten days' notice required by the statute, with reference to memorials, had not been given, and that, therefore, the original ought to have been produced. The learned Judge, however, admitted the evidence, subject to objection. The defendant's Counsel then objected that the affidavit of registry was defective, inasmuch as in the affidavit of registry the plaintiff was described as Martin Reidy, of "Moinvoe," but in the affidavit filed in the Court of Queen's Bench he was described as Martin Reidy, of "Moinvore." That objection also was overruled by his Lordship.

The plaintiff having closed his case, the defendant's Counsel called for a nonsuit, on the ground that no demand of possession had been proved; and also relied on a covenant in the lease under which the lands were held, prohibiting alienation, without the assent of the landlord. His Lordship thereupon nonsuited the plaintiff, but reserved liberty to move to enter a verdict for him in case the Court should be of opinion that he was entitled thereto.

J. Leahy having, accordingly, obtained a conditional order to enter a verdict for the plaintiff, pursuant to the leave reserved, cause was now shown by—

Serjeant *Sullivan*, with whom was *J. Clarke*.

The ejectment could not be sustained without a demand of possession. It will be said that the Act the 13 & 14 *Vic.*, c. 29, s. 7, gives the creditor who has registered an affidavit pursuant to that

section all the remedies of a mortgagee. It does not, however, follow that he was to have them in the same manner. In the case of a regular mortgage, the mortgagor parts with his estate by a deed under his hand; but, under the Judgment Act, the debtor's estate is affected behind his back, and he is made a trespasser by relation, by a proceeding over which he has no control, and which the creditor may forbear to take, for any length of time. Consequences so unjust could not have been within the contemplation of the Legislature.

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Secondly; assuming that demand of possession was not necessary, it must be because the registration has the character of a mortgage, to all intents and purposes; because it is, in the language of the 7th section, an "effectual conveyance," subject to redemption. Once it is proved to be an effectual conveyance, the security is destroyed, for the lease under which the lands are held contains a clause against alienation; and, under the Sub-letting Act, no effectual conveyance could be made of the lease. The assignment would be void even as against the grantor: *Troy v. Kirk (a)*. It cannot be said that it is, at the same time, an assignment by operation of law, and a deed under the hand of the lessee. Again, the registration is defective in point of form. The plaintiff in the judgment is described as of "Monivore," and in the affidavit as "Moinvoe."

• This variance is sufficient, on the authorities, to vitiate the registry: *M'Dowell v. Wheatly (b)*.

The evidence of the document lodged in the Registry-office is also insufficient. The 6th section of the Act puts it on the footing of a memorial; and, therefore, the original should have been produced, or ten days' notice should have been given, pursuant to the 2 & 3 W. 4, c. 87, where copies of memorials are intended to be used.

Lastly; there was no evidence that the document lodged in the Registry-office was an office copy, which it must be, under the 6th section. The evidence of the plaintiff's attorney was, that he got the document from Francis Lacy, the Pleadings Assistant in the Court of Queen's Bench. That did not prove the signature to be Francis Lacy's.

(a) AL. & N. 326.

(b) 7 Ir. Com. Law Rep. 562.

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There was no necessity for a demand of possession. It is admitted that it is unnecessary, in the case of a mortgagee, properly so called; and the Act transfers to the creditor all the debtor's estate, as if an effectual conveyance had been made. There is no hardship on the debtor, for he owes the money, and the rents received must go in liquidation of the debt. The non-alienation clause in the lease only vitiates the assignment as between the tenant and the landlord, at the election of the latter, but does not apply to a question between the tenant and his creditor. *Troy v. Kirk* was a case under the first Sub-letting Act, and does not apply to a lease coming under the provisions of the second Act, 2 W. 4, c. 17. That Act was passed for the protection of the landlord only, and does not profess to invalidate assignments as between the tenant and a third party: *Duke of Leinster v. Metcalf (a)*. At all events, the registration is an assignment by operation of law, and comes within the saving clause of the Act. To work a forfeiture of the lease, it must be shown that there was an act done by the lessee himself. This is a proceeding *in invitum*, like a sale by a Sheriff under an execution, or an assignment under the Bankrupt Laws. The words of the English Bankrupt Act are very similar to those of the 7th section of the 13 & 14 Vic., c. 29: *Bac. Ab.*, 5th ed., tit. *Bankrupt*, F; *De v. Carter (b)*. The objection to the registration, on the ground of misdescription of the plaintiff is quite untenable. "Moinvove" and "Moinvore" are *idem sonantes*; and, at all events, the description is right in the body of the affidavit, where alone the Act requires it to be stated. Again, it is said that the Act makes the copy of the affidavit lodged in the Registry-office a memorial, and that, therefore, the document itself should have been produced. That is not so. The Act, for the purposes of convenience, requires that the document should be numbered and transcribed, and entered in the books and indexes in the office, in like manner as if it were a memorial; but it does nothing more. A memorial is an original document. This document is itself but a copy, and its production would not insure more perfect proof than the production of the examined copy of it.

(a) 11 Ir. Law Rep. 365.

(b) 8 T. R. 57.

There was no objection taken at the trial, that the document lodged in the Registry-office was not proved to be an office copy of the affidavit filed in Court; but we have the evidence of the person who himself compared them, and swears he got the document from "Francis Lacy," the proper officer. It must be presumed the officer in the Registry-office would not have received it unless it was an office copy.

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J. Clarke, in reply.

It is not intended to press further the argument that demand of possession was necessary. Then comes the question, whether the plaintiff has registered the judgment in the manner required by the Act? The objection appears a trivial one, but equally slight ones have been held to be good, as in *Crosbie v. Murphy (a)*. Then the document lodged in the Registry-office is for all purposes a memorial. The debtor is to be deemed the grantor, and the creditor the grantee. The effect of the section of the Judgment Act is to vest in the creditor, by the registration, all the debtor had power to dispose of. Had he power to dispose of this lease? Clearly not. It is settled law that, whatever power the landlord may have to confirm the assignment, the instrument is null and void as between the assignor and assignee. *Troy v. Kirk* is an express authority upon that point. That case dealt with a lease not containing any clause against alienation, but coming under the provisions of the first Sub-letting Act, 7 G. 4, c. 29. The same rule applies to the present lease, which does contain a clause against alienation, and comes, therefore, within the second Sub-letting Act, 2 W. 4, c. 17. The cases from *Troy v. Kirk* to the last reported decision, *Collins v. Healy (b)*, are all uniform in treating the assignment as void between the parties themselves. He also cited *Segrave v. Barber (c)*.

Cur. ad vult.

FIGOT, C. B.

The learned Judge at the trial directed a nonsuit, reserving

(a) 8 Ir. Com. Law Rep. 301.

(b) 9 Ir. Com. Law Rep. 514.

(c) 5 Ir. Com. Law Rep. 67.

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to the plaintiff leave to move to enter a verdict for him, if the Court, upon the whole case, should be of opinion that he was entitled to such verdict. The action was an ejectment for recovery of lands against which, the plaintiff alleged, that he had registered, under the 13 & 14 *Vic.*, c. 29, a judgment obtained by him against the defendant Edmond Pierce. Defence was taken by the other defendant, David Pierce, only. The judgment was proved in the usual way, by an attested and examined copy. A certified copy of the affidavit, filed, for the purpose of the registry, under the 6th section of the Act, in the Court of Queen's Bench (in which the judgment was obtained), and an examined copy of what was alleged to be an office copy of that affidavit, deposited in the Office for Registry of Deeds, were also given in evidence. Mr. Morphy, the attorney for the plaintiff, who had taken these steps for registering the judgment under the 13 & 14 *Vic.*, c. 29, proved that, after lodging the affidavit in the Court of Queen's Bench, he took out a copy of that affidavit, and compared it himself, and then lodged it with the proper officer of the Registry of Deeds. He further deposed that he "got that document from Mr. Francis Lacy, the Pleadings Assistant of the Court of Queen's Bench." The examined copy of the copy of the affidavit, deposited in the Office for the Registry of Deeds, purported to bear the name of "Francis Lacy" at the foot of the document. Evidence was given that the defendant Edmond Pierce had obtained a lease of the lands in question, prior to the judgment, and that he was afterwards in possession of the lands.

Several objections were made at the trial, and before us, in showing cause against the conditional order to set aside the nonsuit, and to enter a verdict pursuant to the leave reserved. First; it was objected that no proof was given of a demand of possession prior to the bringing of the ejectment. We are all of opinion that, if the judgment was properly registered, and the registry was properly proved, and if the other objections which I shall notice are not well founded, this objection cannot prevail. By the 7th section of the 13 & 14 *Vic.*, c. 29, the creditor, by a registered judgment, acquires all the rights of a mortgagee. One of those rights is, to eject the mortgagor, and those deriving under him (where no tenancy or

permissive holding is gained under the mortgage), without a previous demand of possession. David Pierce plainly must be taken to have derived under the other defendant, who must be treated as the mortgagor of the premises, if the registry was valid, and if it conferred a valid title to the lands, under the Act.

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Secondly; the next objection was, that in the judgment the plaintiff was described as of "Moinvore," and that, in the copy of the affidavit deposited in the Office for the Registry of Deeds, the plaintiff is described as of "Moinvoe," and that this variance vitiated the registry. The answer to this objection is that, in the body of the copy of the affidavit deposited in the Registry-office, the residence is accurately stated as "Moinvore;" and, both in the commencement and in the body of the copy of the affidavit in the Court of the Queen's Bench also, the residence is correctly given "Moinvore." On the assumption (as to which I pronounce no opinion) that the omission of the absent letter would have been fatal—that the word was not *idem sonans*, and that the variance was material, still the rest of the copy shows the identity of the parties; it shows that the omission was a mere clerical error; and, upon the three documents taken together, viz., the judgment and the two affidavits, a mistake of identity was absolutely impossible, to any mind of common reason.

Thirdly; the next objection was, that a notice, such as is required in the case of using office copies of memorials of deeds, under the 2 & 3 W. 4, c. 87, s. 32, was not given ten days before the trial; and it was contended that, without such notice, the copy of the alleged office copy of the Queen's Bench affidavit, on which the registry of the judgment was made, was inadmissible, and that *that* office copy could not be proved without its production at the trial. The argument in support of this objection was that, by the concluding words of the 13 & 14 Vic., c. 29, s. 6, the provisions of the 32nd section of the 2 & 3 W. 4, c. 87, in reference to memorials of deeds, are applied to the copy of the affidavit deposited for the registry of a judgment. The answer is, that the 6th section of the 13 & 14 Vic., c. 29, contains no provision for this purpose, nor any words which can have that effect. By that section the judgment creditor is empowered to register the office copy of the affidavit of the judgment in the Office

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for the Registry of Deeds. It requires that "such copy shall be "numbered and transcribed, and shall be entered in the books and "indexes kept in the office, in like manner as if the same were "a memorial of a deed." It provides that, "*for the purpose of such* "entries, the creditor under such judgment shall be deemed the "grantee, and the debtor thereunder shall be deemed the grantor;" and the amount of the debt, damages and costs, or moneys recovered, shall be deemed the consideration: and the like fee shall be paid, on such registration, as in the case of registering a memorial of a deed. This is the entire of the portion of the 6th section which creates an analogy between the registry of a judgment and the registry of a deed; and it contains nothing in reference to the manner in which proof shall be given of the fact of registry, or of the office copy of the affidavit. We have no authority to import into the enactment language which the Legislature has not used, or to incorporate, by intendment, what the Legislature has forborne to incorporate in words. There are no doubtful words (for there are no words at all) on which we could fasten such a construction, even if we thought that, for the same purposes, and in reference to the affidavit, the same provision was necessary or expedient, as to the proof of the office copy of the affidavit, which it was considered necessary by the Legislature to make, in the 2 & 3 W. 4, as to the proof of a memorial of a deed. The office copy of the affidavit is nothing more than the *copy* of an original affidavit lodged in the Court in which the judgment was obtained. The memorial is an *original* document, signed by a party, and attested by witnesses, one of whom must be a witness to the execution of the deed. For many purposes, besides that of an inquiry into imputed forgery, the production of the memorial may be essential for the protection of the party against whom a copy is intended to be used. Some possible reason might be suggested for requiring the production of the *original* affidavit, specifying the lands against which the creditor seeks to register, and stating the amount due on the judgment. But it is difficult to imagine for what purpose the office copy of the affidavit deposited in the Registry-office should be produced, except to impeach the registry; and, for that impeachment, it would seem

that sufficient materials would be supplied by copies of the documents, namely, of the judgment, of the affidavit lodged in the Court in which the judgment was obtained, and of the office copy of that affidavit, deposited in the Registry-office. In the absence of any provision so enacting, we cannot hold that the notice prescribed by the 2 & 3 *W.* 4, c. 87, s. 32, was necessary in the case before us.

Fourthly; the next objection raised the question whether the plaintiff's security is inoperative, by reason of the 2nd section of the second Sub-letting Act, 2 *W.* 4, c. 17, and by reason that the lease under which the defendant Edmond Pierce held contained a clause prohibiting the lessee from assigning the premises. I will assume, for the purposes of our judgment, that the principle of the decisions in *Troy v. Kirk* (a), and *Lessee of Penny v. Gardner* (b), apply; and that, if the 2nd section of the Sub-letting Act governs this case, the security was not voidable only at the election of the landlord, but absolutely void. The question then will be, whether the plaintiff's security is within the protection of the 9th section of the same statute, which provides, in effect, that where a party derives title to the leasehold interest under an assignment from a Sheriff, by virtue of any execution, or under assignment from any executors or administrators, or from any assignee of any bankrupt or insolvent, or *by operation of law*, the party so deriving shall hold the lands, subject, however, to the clauses in restraint of alienation contained in the lease. What we have to determine, in reference to that 9th section, is, whether the plaintiff's security is to be treated as an assignment, by operation of law, within that section? and, in my opinion, we ought so to hold. In the first place, and with a view to the purposes and general intention of the Legislature, appearing in the enactments of the 13 & 14 *Vic.*, c. 29, I think it very plain that it would be inconsistent with those purposes, and that intention, so to construe it as to exempt the plaintiff's security from the operation of the 9th section of the Sub-letting Act. The general purposes and intention of the 13 & 14 *Vic.*, c. 29, were, first, to take away from judgment creditors the remedy by *elegit*, and by any other writ of execution, against lands (save by *fiery facias*), and to take

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(a) Al. & N. 315.
OL. 11.(b) Al. & N. 345.
47 L.

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away also the summary remedy, by the appointment of a receiver under the 5 & 6 W. 4, c. 55, and the right to treat the judgment as a charge upon lands, under the 3 & 4 Vic., c. 105; and, secondly, to substitute for those remedies, for recovery of the judgment debt out of the debtor's lands, a security to be acquired, by registering the judgment against specific lands of the debtor, and to make that security equivalent to a mortgage. Considering these to be the purposes and intention of the Legislature, and attributing to the Legislature the design of no further disturbing the rights which the law, at the time the Act passed, gave to creditors by judgment, than was necessary to effectuate those purposes, I think we ought, giving a reasonable construction to their language, to hold, if that language be susceptible of such construction, that they intended the new security which they gave to be operative against every estate and interest capable of being affected by the old securities which they took away. It appears to me, not only that this was the plain intention of the Legislature, but that they have so enacted by words which, to my apprehension, clearly express that intention. It is unnecessary to advert minutely to the language of the 6th section, nor to more of the language of the 7th section than the closing words of it, on which alone, I think, any ground for controversy exists. The effect of both sections is, plainly, to operate, by means of the registration of the judgment against specified lands, as an assignment or conveyance, by operation of law, of those lands to the judgment creditor, subject to redemption, on payment of the money owing on the judgment. If the legislation stopped there, the effect of those sections, and of the 9th section of the second Sub-letting Act, would be to give to the judgment creditor the rights of a mortgagee of the leasehold lands, subject (as to all future voluntary acts of his) to all the disabilities created by any clauses in the lease in restraint of alienation. Then come the concluding words of the 7th section:—
 “And such creditor, and all persons claiming through or under him, shall, in respect of such lands, tenements and hereditaments, or such estate or interest therein, as aforesaid, have all such rights, powers and remedies whatsoever, as if an effectual conveyance, assignment or other assurance, to such creditor, of all such estate

“or interest, but subject to redemption, as aforesaid, had been made, H. T. 1861.
 “executed and registered, at the time of registering such affidavit.” *Exchequer.*
 It is contended that these words undo the effect, or prevent the REIDY
 effect, which the preceding provisions would otherwise have, of v.
 giving to the security the protection extended by the 9th section of PIERCE.
 the Sub-letting Act to assignments by operation of law. And it is
 argued that the effect of those words is, to impart to the security
 sought to be acquired by the registration all the infirmities which,
 under the other clauses of the Sub-letting Act, would have attached
 to it, if it were a conveyance by deed or other instrument, executed
 and registered at the time of registry of affidavit of the judgment.
 I cannot ascribe to those words that import. I find, in the 9th sec-
 tion of the Sub-letting Act, a protection provided for assignments by
 operation of law; I find, in the 13 & 14 Vic., c. 29, provisions which
 make the “judgment-mortgage” (as it has been not inaptly styled)
 plainly and indisputably an assignment by operation of law. It is
 not the less an assignment by operation of law, because the form of
 language adopted by the Legislature expresses their intention by
 saying that what is done by operation of law shall confer all such
 rights as could be acquired by an actual conveyance by deed. There
 has been in fact no such conveyance. Under the statute, there can
 be no transfer of any right to the land, except by operation of the
 law enacted by the statute. To give those words the nullifying
 effect for which the defendant contends would appear to me not
 only to be not required for effecting any purpose of the Act, but to
 be inconsistent with its object, as shown by its other provisions. The
 concluding words of the 7th section, it is to be observed, do not state
 that the creditor shall have “such rights,” &c., only as if he had
 obtained a conveyance. They state that he shall have “such rights,”
 &c., as if he had obtained “an effectual conveyance.” Now the
 preceding part of the section had given him a right to hold the
 lands, subject to the right of redemption on payment of his debt.
 The subsequent words were, I think, intended not to abridge the
 former, but to enlarge them, by superadding to the right to hold
 subject to redemption all “such rights” as he could have acquired
 by a conveyance; and the words are, not merely “by a conveyance,”

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but "by an effectual conveyance." This appears to me conclusively to show that the Legislature intended to confer on the judgment creditor all such dominion over the land as the debtor had, and to give to the assignment by operation of law the same force as if two things had concurred; first, that the debtor had made an actual conveyance; and, secondly, that such conveyance had been an effectual conveyance of the lands. To so read these words would be utterly inconsistent with the construction according to which they would place this security in the same condition only as if a conveyance had been made ineffectual, by reason of the 9th section of the Sub-letting Act.

I do not think it necessary to advert to the argument *ab inconvenienti*, which might possibly apply, in considering the intention of the Legislature, if the words were, what I think they are not, ambiguous; but, certainly, the consequence of giving them the operation contended for by the defendant would be to create a change in the law, wholly unnecessary for the plainly indicated object of the legislation in the 13 & 14 Vic., c. 29. It would afford easy means of protecting leasehold interests from all liability to judgment debts. I have little doubt that, if it were established as law, persons taking land by lease, instead of desiring to have their leases exempt from provisions in restraint of alienation, would sedulously seek the insertion of such provisions, and that they would be soon extensively employed for the purpose of giving to many of the leasehold tenantry of Ireland complete immunity against their creditors, from all remedy against their lands.

Fifthly; it only remains to notice another objection which was urged before us by the defendant's Counsel. It was contended that there was not proof, on the part of the plaintiff at the trial, that an office copy of the affidavit filed in the Court of Queen's Bench had been, as the statute requires (section 6), deposited in the Office for the Registering of Deeds. This objection does not appear, either by the learned Judge's report, or by the certificate of the plaintiff's Counsel, to have been made at the trial. If it had been made, the plaintiff might have removed it by further evidence. I am, however, unwilling to dispose of the objection on that ground.

The reservation of the learned Judge was, of liberty to the plaintiff "to move to enter a verdict for him, if the Court should be of opinion, upon the whole case, that he was entitled thereto." I think the construction of that reservation may very fairly be considered to be, if the Court should be of opinion upon the entire case, as presented to the mind of the Judge at the trial. So construed, the reservation would exclude matter not brought to the attention of the Judge. But it may be contended that, as the learned Judge was in favour of the defendant, upon one point decisive of the case at the trial, the defendant was not called upon to go further; and it may be urged that if, on the entire case, we find a fatal defect in the plaintiff's proof of title, consisting in the absence of evidence essential to show that his judgment was registered under the Act of Parliament, we ought not to enter a verdict for him, and ought, at the utmost, only to grant a new trial. The Court appeared to entertain that view in the case of *Doe v. Dodd* (a). It is unnecessary to consider whether, under this statute, it is not sufficient to prove, by examined copies, the necessary documents, comprising the judgment, the affidavit in the Court in which the judgment was obtained, and the document lodged as an office copy in the Office for Registering Deeds. It may with some force be urged that, where the statute requires an office copy of the affidavit to be deposited in the Registry-office, and requires several acts to be done in that office, upon the deposit of such office copy, it is to be presumed that, unless it *was* an office copy, it would not have been received; and that the duty of performing those acts would not have been undertaken by the officer whose business it was to receive such office copy (and who had otherwise no authority to do the acts necessary for registering the judgment), unless an office copy of the affidavit had been deposited as the Act directs. In the present case it is, in my opinion, unnecessary to consider whether the production and proof of examined copies, including a copy of the document deposited in the Registry-office, would be *prima facie* evidence, casting upon the opposite party the *onus* of impeaching the registry of the judgment.

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(a) 2 N. & M. 838.

H. T. 1861. The plaintiff went further on the trial. He proved, by Mr. Morphy, his attorney, that Mr. Morphy got from Mr. Francis Lacy, the Pleadings Assistant of the Court of Queen's Bench, the document which he deposited in the Registry-office. He also deposed that he himself compared that document, which was a copy of the affidavit, with (as I understand his evidence) the original. The examined copy of the document in the Registry-office, produced by Mr. Morphy at the trial, bore, at the foot of it, the name of Francis Lacy, which, therefore, must be taken to be upon the document deposited in the Registry-office. There is no entry upon it purporting to be a certificate that it was compared by Mr. Lacy, or that it was a correct copy; neither is the official character of Mr. Lacy expressed upon the document. But we can take notice of the course of the Courts of Common Law; and we are not only at liberty, but, in my opinion, we are bound, to determine what an office copy is, by reference to what we know that course to be. It is hardly necessary to refer to the authorities which show that this is one of the matters of which Courts of Law take judicial notice. They are collected in most of the text-books: 1 *Tayl.*, p. 26; 1 *Starkie on Evidence*, p. 20, in the note, *Lane's case*; 2 *Coke*, p. 16; and *Thomas' note D, Mounson v. Bourn*; *Cro. Car.*, p. 527; see *W. Jones*, p. 417; and see the observations of Baron Parke, in *Caldwell v. Hunter* (a).

Such, in an especial manner, is our duty when we deal with documents to be used in registering our own judgments upon office copies furnished by our own officer. Now the course has been (whether it is a convenient course, or whether it ought to be altered, is not now the question) that, in giving an office copy, the officer does no more than simply affix his signature at the foot of the copy. Such a copy, so authenticated, we should be bound to receive in our own Court, in the cause in which a judgment was obtained, upon its mere production with the signature of our own officer. Such a copy every other Court of Common Law would similarly recognise; and such a copy, so authenticated by the officer of any of the Courts, must be an "office copy," for the purpose of registering a judgment under the statute. The Legislature, in directing an

(a) 10 Q. B. 86.

"office copy" to be used, must be taken to have intended what was an "office copy" according to the course of the Court in which it was to be obtained. The distinction between "office copies" and "examined" or "sworn copies" is well known and understood, and has been long recognised. Where a copy is "authenticated by a person trusted for that purpose," there that copy is evidence:" *Gilbert on Evidence*, p. 24. The distinction is noticed in *Denn v. Fulford* (a); *Highfield v. Peake* (b); *Burnand v. Nerot* (c); *Appleton v. Lord Braybrook* (d). Several cases are collected in *Roscoe on Evidence*, p. 97. The rule is, that office copies are receivable, in the same Court, in the same cause, upon the production of the copy attested by the officer: and if that be so, this office copy was receivable in the matter of the judgment in the cause in which it was made. The officer at the Registry-office was bound to act on that office copy; and that office copy was proveable by evidence showing that it was obtained in the proper office of the Court of Queen's Bench, and authenticated by the proper officer there. Of this there appears to have been evidence given at the trial, abundantly sufficient to constitute *prima facie* proof, casting on the defendant the burthen of encountering it by evidence to contradict or to explain it. Mr. Morphy proved that he got the document from Mr. Lacy, the Pleadings Assistant. One of the duties which the law imposes on that officer is, "to receive, file and make entries of pleadings and documents, and to attest copies thereof." This appears from the schedule (A) to the Law Courts Act, 7 & 8 Vic., c. 107. When the officer gave to Mr. Morphy the document, purporting to be a copy of the affidavit, with his own name upon it, he would have been guilty of a gross violation of his duty, and of the law, if what purported to be his signature was not genuine, and if the document which he attested by his signature was not what that signature, according to the practice of the Court, attested it to be. The presumption is, that the officer, in the act of so giving the document to Mr. Morphy, did not commit a misprision in his office and a violation of the law. That presumption must stand

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(a) 2 Bur. 1179.

(b) M. & M. 109.

(c) 1 C. & P. 579.

(d) 6 M. & S. 38.

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until rebutted; and the result is that, upon the evidence of Mr. Morphy, unencountered by any proof, it must be taken that the document which he deposited in the Office for Registering Deeds was "an office copy" of the affidavit. On the whole, I am of opinion that the point saved ought to be ruled with the plaintiff, and that a verdict ought to be entered for him, pursuant to the leave reserved.

FITZGERALD, B.

The principal question in this case turns on the proof sufficient to be given of the registration of a judgment under the 13 & 14 Vic., c. 29. The registration of such a judgment constitutes the plaintiff's title. The registration consists in the deposit, in the Office for Registering Deeds in Ireland, of an office copy of an affidavit to be made in the Court where the judgment is obtained, containing certain particulars. On the argument before us, it was, amongst other things, contended that there was no proof that any such office copy was deposited in this case. The office copy is a copy of the affidavit, authenticated by the signature of the proper officer, the Pleadings Assistant of the Court in which the judgment is obtained. By the 72nd General Rule, the production of such a document, purporting to be signed by the proper officer, would be sufficient evidence, without proof of the signature or of the attestation or comparison thereof. The mere production, therefore, of the document lodged in the Registry-office, if it purported to be signed by the officer, would be proof that it was an office copy. The document lodged in the Registry-office here was not produced, but it was proved that a document was lodged in the Registry-office by the plaintiff's attorney, which had been compared by him with the original affidavit, and which document he received from Francis Lacy, the Pleadings Assistant in the Court where the judgment was obtained; and then a compared copy of that document, and attested by the officer of the Registry for Deeds, was produced. This copy purported to have the name of Francis Lacy at its foot. I am of opinion that this was not proof that the document lodged in the Registry-office was an office copy, without proof that the

document was signed by Francis Lacy; though, if the document itself was produced, with a signature purporting to be Francis Lacy's, we would be bound to take judicial notice of the signature. But upon reference to the learned Judge's note, I do not find that the copy from the Registry-office was objected to on this ground; and that being so, and as, under the circumstances, I consider it a purely formal objection, I do not feel myself bound to give any effect to it now. The other objection is, that the registration is, under the Act of Parliament, to have that effect only which an effectual conveyance of all his interest in the lands to which it relates, by the judgment debtor, would have had; and in this case it is said no effectual conveyance could have been made by the judgment debtor, by reason of the Sub-letting Acts. Upon this point I confess I have entertained, and do still entertain, the most serious doubts. Not, however, being able to come to a conclusion satisfactory to my own mind either way, and as my LORD CHIEF BARON, and my Brother HUGHES, entertain no doubts on the question, I have not thought it right to delay the parties by asking for further discussion on the point.

HUGHES, B., concurred.

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DUBLIN AND WICKLOW RAILWAY COMPANY.*

Jan. 12, 14,
19.

THIS was an action by the plaintiffs John Scott, and his wife
Jemima Scott, against the Dublin and Wicklow Railway Company,

In an action
for injuries,
resulting from
alleged negli-
gence—

Firstly; the plaintiff cannot recover unless the injuries were caused by the negligence of the defendants.

Secondly; nor can the plaintiff recover, notwithstanding there be negligence

* Before PIGOT, C. B., and FITZGERALD and HUGHES, BB.

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The summons and plaint, in its first paragraph, complained in substance that the defendants were common carriers of passengers and goods, for hire, and, as such, the owners of the Dublin and Wicklow Railway Company, and of certain railroads, stations, bridges and platforms between Wicklow and Dublin, and also of certain trains for the conveyance of passengers and goods, for hire, and that it was the duty of the defendants, as such common carriers, to safely and securely carry all passengers conveyed by them; that the plaintiff Jemima Scott, on the 25th of January 1860, at the request of the defendants, was received by them as a passenger on their Railway from Stillorgan to Dundrum, and that the train and engine attached thereto, and the arrangements connected with the arrival of the said train, and the setting down of passengers therefrom at Dundrum, and its departure from said last mentioned station, were, on the said occasion, so negligently, carelessly and improperly managed by the defendants, their station-master and servants, that the plaintiff Jemima was not safely and securely carried and set down at Dundrum, but, in the progress of her journey thereto, and by reason of the neglect of the defendants, the plaintiff Jemima fell and was precipitated, from one of the carriages of the defendants, upon the public road, and thereby sustained great injury, &c.

There were two other paragraphs in the summons and plaint, varying the statement of the cause of action, and setting forth the instances of neglect and breach of duty on the part of the defendants. The defendants pleaded that the injuries in the several counts of the

in the defendant, if he have so far contributed to the accident, by want of ordinary care, that but for that the accident would not have happened.

Thirdly; but though the plaintiff has so contributed to the accident, by want of ordinary care, he is not disentitled to recover, if the defendant might, by ordinary care, have avoided the consequence of the plaintiff's neglect.

Where there was antecedent negligence on the part of the defendants, operating up to the time of the accident, and then contributory negligence of the plaintiff, without which the accident would not have happened—

Held—That the Judge was not bound to tell the jury that the defendants were not liable, unless they could, by a *new physical act*, irrespective of such antecedent and continuing negligence, have avoided the consequences of the plaintiff's neglect.

Observations on *Tuff v. Warman* (5 C. B., N. S., 573), and *Waite v. North-Eastern Railway Company* (1 Ell., Bl. & Ell. 719).

summons and plaint complained of were occasioned by the negligence, carelessness and default of the said Jemima Scott, and that same were not, nor were, nor was any of them, occasioned by negligence, carelessness or default on the part of the defendants.

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The case was tried before the LORD CHIEF BARON and a special jury at the Sittings after Trinity Term 1860. The undisputed facts of the case were as follows:—The plaintiff Mrs. Scott, on the night of the 25th of January 1860, travelled in a third-class carriage on the defendants' Railway from Stillorgan to Dundrum. The rails were slippery, and the train, which consisted of fourteen carriages, with one break-van, overshot the platform at Dundrum station, and went on to a bridge by which the Railway was conducted over the high road. The length of the platform at the station was 357 feet 6 inches, and the distance from the nearest lamp to the bridge was 156 feet; from the signal post to the bridge, 88 feet 6 inches, and from the farthest lamp to this bridge, 256 feet. The bridge, which was 43 feet in length, had an iron balustrade, 43 feet 6 inches long, the piers of which were 3 feet 6 inches in height over the level of the line. The bridge was provided with a platform, 1 foot 8 inches over the level of the line, and the balustrade of the bridge was 2 feet 9 inches over the level of the line, while the top of the balustrade was 24 feet over the level of the road beneath. The space between the step of the carriage, when opposite the bridge and the balustrade, was only 2 feet 2 inches, and the step was 7 inches higher than the top rail of the bridge, and a person descending on the platform should step down 1 foot 8 inches. The floor of the carriage was thirteen inches higher than the step. Upon the arrival of the train at this bridge, the plaintiff herself opened the door, and, without using the step of the carriage or the handle of the door, sprang forward as if to reach a platform, when she was precipitated over the balustrade of the bridge upon the road beneath. There was a conflict of evidence as to whether the train had then ceased to move, or whether there was sufficient light to distinguish the bridge from the platform.

The witnesses for the plaintiff stated that, as the train approached the station, and while it was in motion, the name of the station "Dundrum" was called out by the Company's ser-

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vants; that the train then came to a stop at the bridge, and that it was motionless when the plaintiff got out; that there was no servant of the Company on the bridge, and no warning was given to the passengers; that the station was insufficiently lighted, and that upon the night in question neither of the lamps next the bridge was lighted; that the night was so dark that the top of the bridge, which was painted brown, could with difficulty be distinguished from the platform. The plaintiff gave as a reason for springing out of the carriage that she had seen a lady hurt at the Dundrum station while using the step of the carriage, and that she had since discontinued the use of the step; and another witness deposed that, to an active person, it would come handier to spring than to step out.

At the close of the plaintiff's case, the defendants' Counsel called for a nonsuit, or a direction, on the ground that there was no evidence of such negligence in the defendants as would subject them to the action. Secondly; because, upon the evidence given for the plaintiff, the accident was entirely attributable to the plaintiff Jemima's want of proper care and caution. Fourthly; because there was no evidence upon which the jury might conclude that the damage was occasioned entirely by the negligence of the defendants, or that the defendants might, by the exercise of care, have avoided the consequences of the plaintiff's neglect. Fifthly; because the evidence established that the negligence of the plaintiff Jemima, in leaving the carriage, had contributed to or occasioned the injury, and that there was no evidence that the defendants might, by the exercise of ordinary care on their part, have avoided the consequences of the plaintiff's neglect. Sixthly; because there was no evidence to show that it was physically possible for the defendants, by the exercise of any amount of their care, to have avoided the consequences of the plaintiff's neglect. His Lordship refused to do as required by the defendants' Counsel; and this refusal was the subject-matter of the first six exceptions.

On the part of the defendants, three witnesses were then called, who deposed that they were in the carriage with the plaintiff Mrs. Scott, on the night in question; that she got up before the carriage reached the shed; that coming to the plat-

form she rose, crossed the carriage, took down the window, opened the door, and stood in it for one and a-half or two minutes, and leaped out without using the handle of the door, before the train came to a stand, and that it moved a short distance after; that the name of the station was not called out in their hearing before Mrs. Scott left the carriage; that there was plenty of light from the sky to distinguish the bridge from the platform; and that, when she jumped out, they did not think she was over the bridge, but that she was safe on the platform; that the engine was reversed when it appeared that the train would pass the station, and that in such a case no delay is caused before it assumes a retrograde motion; that a person rushing out from the train might mistake the bridge for the platform, but that a person acting with proper caution had sufficient light to distinguish them; that if a lamp was on the bridge she would not have jumped out; and that, as stated by one witness, she went over partly from want of caution, and partly from want of light.

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John Bellew, the guard of the train, proved that, by the rules of the Company, if there were more than nine carriages there should be a second break, independently of the one on the engine. Two porters on duty at the station, on the night in question, swore that the name of the station was not called out; that they ran along the platform, and called to the people to keep the doors shut and keep back; and that since the accident there was a general order against calling out the name of the station until the train stops. The bye-law of the Company, imposing a penalty of 40s. on any person leaving a carriage while in motion, was also given in evidence on their behalf. At the close of the defendants' case, the requisition made at the close of the plaintiff's case, for a nonsuit or direction, was renewed upon the same grounds, and with a similar result. The seventh to the twelfth exceptions were conversant with these requisitions, and their refusal.

In the summing up, the LORD CHIEF BARON told the jury that the plaintiffs were entitled to recover only in case the injury was caused by the negligence of the defendants.

Secondly; that the plaintiffs were not entitled to recover, not-

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withstanding the negligence of the defendants, if the plaintiff Jemima herself so far contributed to the misfortune, by her own want of ordinary care and caution, that but for such want of ordinary care and caution, on her part, the misfortune would not have happened. But—

Thirdly; although the plaintiff Jemima contributed to the misfortune, by her want of ordinary care and caution, that would not disentitle the plaintiffs to recover in this action, if the defendants might, by ordinary care on their part, have avoided, in the occurrence complained of, the consequence of the neglect or carelessness of the plaintiff. But—

Fourthly; that the negligence of the defendants, in order to entitle the plaintiffs to recover, notwithstanding the plaintiff Jemima's own want of ordinary care, must be negligence operating at the time of the occurrence, and causing the mischief.

Counsel for the defendants then called upon his Lordship to tell the jury that, though the Company were guilty of antecedent negligence, and though the imputed negligence continued up to the time of the plaintiff Jemima springing from the carriage, and caused the mischief, the defendants were not liable, if the plaintiff Jemima left the carriage in a careless and negligent manner, and that such want of care occasioned or contributed to the injuries, unless the defendants could, by the exercise of care, have then, by a new physical act, irrespective of said continuing negligence, so operating and causing the mischief, have prevented the consequences of such want of care on the plaintiff Jemima's part. His Lordship, however, declined to alter his charge; and this refusal was the subject-matter of the thirteenth exception.

The questions raised by the fourteenth and fifteenth exceptions sufficiently appear in the judgments of their Lordships.

The jury found that the injuries complained of were occasioned by the negligence, carelessness and default of the defendants, and not by the negligence, carelessness or default of the plaintiff, and gave a verdict for the plaintiffs, with £500 damages.

A bill of exceptions having been settled, embodying the foregoing objections, the cause now came on for argument.

F. M. Darley, with *F. Macdonogh* and *H. E. Chatterton*, in *H. T. 1861.*
support of the bill of exceptions. *Exchequer.*

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There was no evidence of negligence on the part of the defendants. The overshooting of the station is not included among the charges of negligence. That was admitted to be an unavoidable accident. The first charge of negligence is the alleged insufficiency of light, but that was at a place which the Company were not bound to light. There could not have been porters at the bridge, for their duty was to be at the station. Nor was the calling out of the station negligence. It is called out, not to tell the passengers to get out, but to apprise them of the name of the station. The accident resulted from the plaintiff's leaping out at the bridge. The Company could not reasonably have anticipated such an accident, and are, therefore, not answerable for the consequences of it: *Cornman v. The Eastern Counties Railway Company* (a). It is not enough that there was a scintilla of evidence of negligence; there must have been evidence upon which the jury could reasonably and properly conclude that there was negligence: *Toomey v. The London, Brighton and South Coast Railway Company* (b); *Martin v. Great Northern Railway Company* (c). Then there was negligence on the part of the plaintiff, without which the accident could not have happened; and where that is so, in any degree, the plaintiff cannot recover: *Dowell v. The General Steam Navigation Company* (d); *Bridge v. The Grand Junction Railway Company* (e); *Butterfield v. Forrester* (f); and there was no evidence that it was possible for the defendants to have avoided the consequences of the plaintiff's want of care. If there was no such evidence the defendants are not liable. This appears from the decision in *Waite v. North-Eastern Railway Company* (g). There the plaintiff, an infant, came to the defendants' station under the charge of his grandmother. It was necessary, in order to get into the train by which

(a) 4 H. & N. 781.

(b) 3 C. B., N. S., 146.

(c) 16 C. B. 179.

(d) 5 Ell. & Bl. 195.

(e) 3 M. & W. 244.

(f) 11 East, 60.

(g) 1 Ell., Bl. & Ell. 719.

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they were to travel, to cross defendants' line. They were allowed to cross the line at an improper time, through the negligence of the defendants' servants, and were struck by a train passing the station, not the one in which they were about to travel. The grandmother was killed, and the child severely injured; and an action having been brought against the Company, the jury found that the Company were guilty of negligence, and that the grandmother was also guilty of negligence, which contributed to the accident; and it was held by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the action was not maintainable. It was impossible, in that case, for the Company to have averted the consequences of the parties' neglect. So it was in the present instance. Some of the *dicta* of the Judges, in *Tuff v. Warman* (a), on which the plaintiff will rely, are inconsistent with the decisions in *Dowell v. The General Steam Navigation Company*, and *Waite v. The North-Eastern Railway Company*; but, at all events, the rule in *Tuff v. Warman* does not reach the present case, in which the only negligence alleged on the part of the defendants is antecedent to the plaintiff's neglect, and continuing up to the time of the accident, and where it was physically impossible for the defendants to have avoided the consequences of the plaintiff's want of care. The third proposition of the learned Judge's charge was in the language of the judgment in *Tuff v. Warman*; but we object to it, as being inapplicable to the present case, and calculated to mislead the jury, as there was no evidence in the case to which the rule could be applied. The doctrine of law applicable to this case is that deducible from *Dowell v. The General Steam Navigation Company*, and *Waite v. The North-Eastern Railway Company*. He also cited *Davies v. Mann* (b), and *Senior v. Ward* (c).

J. O. Coffey, and Serjeant *Sullivan*, contra.

The defendants seek, by the thirteenth exception, to engraft on the judgment in *Tuff v. Warman* a new proposition, for which there is no authority, and which would lead to absurd consequences. The

(a) 5 C. B., N. S. 573.

(b) 10 M. & W. 548.

(c) 28 L. J., Q. B., 139.

effect would be that, no matter how great the negligence of the defendant might have been, and though it might have been the cause of the mischief, they would be irresponsible if, under the circumstances, they could not have done some new physical act. Suppose a telegraph pole to have been projected by accident over the line, and that it was seen by a servant of the Railway Company, and that a passenger, in passing it, puts his head out of the window of the carriage, strikes it against the pole, and is killed; according to the argument, the defendants would be irresponsible, for, from the nature of the case, the doing of any new physical act, to avoid the consequences of the passenger's negligence, would be impossible.

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The Court called on *F. Macdonogh*.

Where the plaintiff has been negligent, to the extent that his neglect is the proximate cause, or the *causa causans* of the injury, the question of negligence on the part of the defendants becomes utterly immaterial. That is so where the plaintiff's negligence is in any degree the proximate cause, and in such cases the rule in *Tuff v. Warman* does not apply. The charge is objectionable, because it diverts the mind of the jury from the real state of facts to an imaginary case, viz., of remote concurrence on the part of the plaintiff with the cause of the injury. The neglect here, if any, on the part of the defendants, was antecedent to the plaintiff's want of care, and continuing, but there was no evidence whatever of any subsequent neglect on the part of the Railway Company.

Cur. ad. vult.

FIGOT, C. B.

By the exceptions taken at the close of the plaintiff's case, the question raised is, whether a nonsuit or a verdict for the defendant ought to have been then directed, upon the following grounds, or some of them?—First; that there was no evidence of such negligence in the defendants as made them liable in this action. Secondly; that the injury was entirely attributable to the plaintiff's want of ordinary care and caution. Thirdly; that there was

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no evidence to go to the jury that the defendants, by ordinary care could have avoided the want of care and caution of the plaintiff. As to the first ground; it is impossible to maintain that there was no evidence of such negligence in the defendants as would make them liable in this action. Evidence was given which, if believed, tended strongly to establish the following facts:—that the platform was very imperfectly lighted; that there were lamps which, it may be inferred, were placed where they were, on the ground that light from them was required, but in which no lights were placed; that the station “Dundrum” was called out by one of the porters, indicating to the passengers that the train had arrived at that station; that the train overshot the station, and rested with one third-class carriage (in which the plaintiff was) on the bridge, and another immediately behind it; that the night was frosty, causing the rails to be so slippery as to render likely the result which happened, namely, that the train went beyond the station before the means at the disposal of those having the conduct of it were made effectual for stopping it; that, according to the experience of more than one witness, it was not the practice of the porters to open the doors of third-class passengers, who, when stopping at Dundrum, descended from those carriages after the doors had been opened, either by themselves or by some of the other passengers; that the train rested for about three minutes before it returned back to its place at the platform; that no warning was given that the passengers should not get out at the bridge, although there was a porter on the platform, and that the plaintiff saw no servant or porter at or near the door when she opened it; that it was so dark at the bridge, that one of the witnesses said he could not distinguish the piers on it, though one of those piers was proved to be just at the end of the platform; that it would be hard for any person to distinguish the top, or balustrade, of the bridge, for it was painted brown, and not easily seen; that if it was white it might have been observed; that the balustrade of the bridge was so low, that the floor of the carriage was one foot eight inches over the highest part of the balustrade, which was seven inches below the carriage step; that the carriage step was only eight inches below the highest part of the pier; and that from the

edge of the carriage the horizontal distance to the balustrade was two feet six and a-half inches. This was a body of evidence plainly showing that a person leaving the carriage on the bridge, unapprised that he was on the bridge, supposing that he was on the platform, and, therefore, unprepared for the precautions which he would otherwise be naturally prompted to take in descending there, would be in some, if not in considerable, danger of falling over the balustrade: and if that be so, the question at once arose, whether it was not the duty of the defendants (or of their servants, for whose negligence they must be responsible), first, to have provided sufficient lights to show to a passenger, stopping on the bridge, where he was; or, if there were not fixed lights sufficient for that purpose, to apprise the passengers, by means of a porter holding a hand-light, or speaking his warning loud enough and near enough to be heard, that they were stopping on the bridge, and not on the platform, which had been overshot by the train? Further, the announcement of the servant, from the platform, that they were arriving at the station, followed by the stoppage of the train immediately after, was calculated to lead the passengers to the inference that the train had arrived at the platform; and if that were so, it was a question for a jury, whether the omission to correct the mistaken announcement, by apprising the passengers of the carriage in which the plaintiff was, that they had *not* stopped at the station, but had gone beyond it, and were on the bridge, was, or was not, a want of ordinary care in those having, on that night, the charge of the train and the platform? Upon this body of testimony, I am clearly of opinion that there was abundant evidence from which the jury might, not unreasonably, infer negligence, leading the plaintiff to believe that she was on the platform, and might descend in safety, and thus calculated to induce her so to descend, and to let herself out, with a view to her passing through the gate where tickets were taken from passengers stopping at Dundrum, according to the usage at that station, which was proved by the plaintiff's witnesses.

Secondly; it is, in my judgment, also impossible to maintain that there was not that in the evidence which raised a question to be determined, not by the Judge, but by the jury, whether the plaintiff

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caused the injury by her own want of ordinary care? The chief argument addressed to us on this point was that, to spring out of the carriage was, under the circumstances proved by the plaintiff, in itself, such clear proof of negligence that this question should have been withdrawn from the jury. But there was evidence that the step was narrow—that the plaintiff had, about two months before the occurrence in question, seen a lady alip from the step, and had seen the lady's foot glide down between the step and the platform—a circumstance well calculated to alarm. The plaintiff swears that, before this occurrence, she had been in the habit of descending from the third-class carriages (in which she frequently travelled) by the steps, and that, in consequence of that occurrence, she had afterwards been in the habit of jumping on this same platform. One of the witnesses (Strahan) stated, on his cross-examination, that, supposing himself to be opposite the platform, he would have stepped out; though he also said that his practice was to descend by the steps. Another of the plaintiff's witnesses, on his cross-examination, said that to an active person it would come handier to spring out; and, in answer to the question, "do you mean it would be handier to jump down, and not forward?" he said, "I do; for "jumping down, I would not use the handle; I mean, to jump "straight downwards, and not horizontally;" and he further said that he found great difficulty in using the step; that he travelled in a third-class carriage on purpose, and found that he was obliged to turn half-round, and hold on by the handle while he got out. The plaintiff, after stating the calling out of the station, and the stopping of the train, swore that she made preparations for leaving the carriage, taking up her cloak and umbrella, and making her way to the door of the carriage, between some other passengers, to whom she spoke. She swore that, during this interval, the train was at a "dead stop;" and she swore that she then believed that she was at the platform. The latter statement no one could doubt; for, unless she acted under that belief, it is very unlikely that she would have sprung from the carriage, even in her ignorance that she was on the bridge. Now, I am far from saying that there was not evidence, in all that I have stated, from which the jury might have inferred that

there was want of ordinary care in the plaintiff. It may have been more reasonable to hold that, in the darkness in which she was, she ought to have waited until some porter of the Company came to ask tickets from such of the passengers as were going on to Dublin; but if she believed that she was on the platform, and if she had reasonable grounds for so believing, then the question at once arises, is it *necessarily* want of ordinary care in a passenger in a Railway carriage to jump upon the platform? or is it, or is it not, a question for a jury, whether such an act does or does not evince a want of such care, regard being had to the youth of the party, to her previous practice, unattended with mischief (for ought that appeared), to the height of the floor of the carriage over the platform, and to the height and construction of the steps, of which the dimensions were proved, and in preference to the use of which she preferred that mode of descent to the using of the steps for the purpose? It appears to me that there was very strong evidence to show that the plaintiff did not form an unreasonable inference in supposing that she was at the platform; and that there was evidence (its weight was, in my judgment, entirely for the jury) upon which a jury question arose, and on which the Judge ought not to have decided, whether, under all the circumstances, the springing from the carriage, of which the danger was not shown to her by light, or announced to her by any warning, was or was not an act done with a want of ordinary care? It was urged that she jumped out horizontally, and not "straight down." I do not think that it can be assumed, upon the evidence, that she sprung in any other way than according to her usual custom, that is, so as to reach the platform (if it had been there) with least concussion or inconvenience to herself. She swore that she lost consciousness when she left the carriage, and she was unable to state how she passed over the bridge; whether in descending obliquely, her foot struck the pier or the balustrade, and she was thrown headlong over, or (which is, I think, far less likely) she cleared the bridge in a bound, must for ever remain a mystery.

Thirdly; the third question which arises on the three last of the first six exceptions may, in my judgment, be, upon the plaintiff's evidence, very shortly disposed of. If it was the duty of the Com-

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pany or their servants to have taken care that, in the defective light of the platform, and the darkness of the bridge, a porter or servant should have gone to the bridge, and held a light, or otherwise warned the passengers there, it is plain that, at the very moment of the plaintiff's leaving the carriage in the manner which she described, he might have prevented the injurious result, by simply holding her by her dress or her arm. If he had even held up a hand-light at the very moment of her making the spring, she might have caught the carriage-door, and saved herself from the consequences of her own act, before her descent had been accomplished. If a light had been on the bridge when she opened the door, and moved forward, it was not impossible that, on showing the danger, she might have caught the door, or the handle, or might have checked her own impulse before the movement was complete. To some extent the same observation would apply, if the balustrade had been painted white, and if the witness Strahan was right in his view of that matter. But it appears to me that this question could not have been withdrawn from the jury without a usurpation of their functions by the Judge. So the case, in my opinion, stands, in reference to the first set of exceptions.

The defendants went into evidence, I will not here stop to inquire how far their so doing was a waiver of those exceptions by which they called for a direction for a verdict for them, upon the plaintiff's evidence alone. If they should now succeed on these exceptions, the judgment must be an award of a *verdict de non*. On a second trial, the plaintiff could examine the defendants' witnesses; and then the question must be determined, not on the evidence only given for the plaintiff at the last trial, but on the evidence (supposing the witnesses for the defendants should depose truly) comprising the whole testimony now before us, on both sides, on this record. I have dealt with the plaintiff's evidence as if none had been given for the defendants, and as if the defendants were not precluded from now insisting on the exceptions taken at the close of the plaintiff's case, by afterwards presenting evidence of his own. I mention this, because I desire to guard myself against being supposed to sanction the proposition that the defendants are

on those first exceptions, entitled to insist on a *venire de novo*, if, by their own evidence, in addition to the plaintiff's testimony, they have furnished grounds for sustaining the verdict. Most of the subsequent exceptions comprise in effect the substance of the former. That, in itself, would be a sufficient reason for not withdrawing, on those grounds, the case, when it closed at both sides, from the jury; for, upon any contrariety of evidence, or upon explanatory proof, it would be for the jury to decide. But there was much, in some parts of the evidence given for the defendants, to fortify, although there was in that evidence matter also to encounter, the case made for the plaintiff, on the plaintiff's evidence alone. I shall not advert to it in detail; but I may allude, as instances, to the evidence given in reference to the calling of the station—in reference to the bye-laws and rules, on the subject of calling the station, and providing sufficient breaks—in reference to the porter going down the line, seeing the carriages on the bridge, and returning without going up to the bridge, although he had a hand-light in his hand—and, in particular, to the testimony of the engine-driver, who, although in answer to a question from the jury, he stated that he thought "the plaintiff's act was caused partly by want of light, and partly by want of care," added, with a truth and candour which were creditable to him, sworn, as he was, to tell the whole truth, "that he was of opinion that "she would not have gone over, if there had been a light on "the bridge." With respect to the plaintiff's belief, and the reasonableness of that belief, that, when she left the carriage, she thought she was descending on the platform, three of the defendants' witnesses, all of whom were travelling on their way to Dublin, in the same carriage in which the plaintiff went from Stillorgan to Dundrum, gave important testimony. Archibald Ritchie, on his cross-examination, said "that he did not run to "the door when she jumped out; that he did not think she was "over the bridge; that he thought she was safe on the platform." Andrew Ritchie, on his cross-examination, said "that he thought she was on the platform when she leaped out." Eliza Green, on her direct examination, stated "that she did not know that Mrs.

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"Scott had gone over the bridge, until they had come back to the platform;" and, on her cross-examination, she said "that witness did not know, until she got back to the platform, what happened; that she (witness) thought she (Mrs. Scott) got out of the carriage, and was all right." This was strong evidence to show that three persons, travelling in the same carriage, had formed, on the same grounds, the same inference, on which Mrs. Scott stated that she acted, namely, that the carriage was at the platform, and that she could descend without danger. This disposes of the exceptions from the seventh to the twelfth, inclusive. The thirteenth exception raises the question whether the third of the instructions given to the jury ought to have been qualified as required by this exception? The law affecting the question how far a plaintiff, in an action for negligence, is disentitled to recover, by reason of his own want of ordinary care, has been dealt with in several modern decisions, beginning with *Butterfield v. Forrester* (a), and ending with *Tuff v. Warman* (b). In *Butterfield v. Forrester*, the rule was applied, that the plaintiff was disentitled to recover, if the mischief was caused by his own want of ordinary care. But reason and justice required that that rule should be qualified; and, accordingly, it was qualified in several subsequent cases. In some of these, as in *Dowell v. The General Steam Navigation Company* (c), it was said that the negligence which shall disentitle the plaintiff to recover must be the "proximate cause," or "the *causa causans*" of the mischief; in others, as in the instructions given to the jury, at the trial, in *Tuff v. Warman*, the expression used was "direct cause." I own it appears to me that, to adopt a form of direction which would involve jurors in such a discussion as an ingenious advocate could raise upon the theory of causation, and the distinction between remote and proximate causes—a subject which has perplexed metaphysicians from the days of the disquisitions of the schoolmen down to those of the essays of Hume and of

(a) 11 East, 60.

(b) 2 Com. B., N. S., 740; S. C., Ex. Cham., 5 Com. B., N. S., 573; 36 Law Jour., N. S., C. P., 263; 5 Jur., N. S., 222.

(c) 5 El. & Bl. 195.

Brown—would not tend to convey clear and satisfactory instruction to men of plain understandings, and of ordinary information. It is impossible to read the report of the discussion which took place on the argument of *Tuff v. Warman* (especially as reported in 5 *Jurist*, N. S., p. 223), without perceiving the great inconvenience of a disquisition of that kind in a Court of Law. I might make a similar observation in reference to some parts of the argument addressed to us in the present case. The duty of Judges is to apply, as far as they can, for the instruction and guidance of juries, simple rules and language suited to ordinary capacities, and not to involve them in nice distinctions, or speak to them in language which it requires skill and learning to comprehend. The judgment of Mr. Justice Williams, when *Tuff v. Warman* was before him, in the Court of Common Pleas, well illustrates this difficulty.*

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When the Court of Exchequer Chamber came to deal with the question, they avoided this difficulty. The case was most elaborately discussed, and appears to have been very fully considered. It was argued on the 10th of May 1858. The Court took time to consider, and the unanimous judgment of the Court was delivered by Mr. Justice Wightman, on the 18th of June following. That judgment lays down the rule to be applied in such cases as that which was then before the Court, translating the rule in reference to "proxi-

* NOTE.—He says, after referring to the case of *Dowell v. General Steam Navigation Company*:—"Then comes the question, what is meant by the negligence of the plaintiff being proximately or directly contributory, or only remotely connected with the accident? And that is a question which must somehow or other be disposed of at the trial. I dissent entirely from the proposition urged by Mr. Collier, that the plaintiff is disentitled to recover, if his negligence is either proximately or remotely connected with the accident. But I feel great difficulty in dealing with the question whether the negligence was proximate or remote; and I certainly feel great difficulty in getting rid of that question of law, by leaving it to the jury. That, however, was the course adopted in the case of *Dowell v. The General Steam Navigation Company*, and followed by my Brother Willes upon this occasion. I will not attempt to controvert or dispute the propriety of that now, however much I may lament that the law is not on a more intelligible and satisfactory footing in this respect. It was further objected that, when the matter came to be left to the jury, it should have been left to them to say whether they thought the defendant might, by exercising ordinary care and diligence, have avoided the accident. It seems to me that this was in effect left to them."—2 C. B., N. S., p. 757.

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mate" and "direct" causation, into the following plain, familiar and unambiguous language:—"It appears to us, that the proper question for the jury in this case, and, indeed, in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary and common care and caution, that but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened? In the first case the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Merely negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. This appears to be the result deducible from the opinion of the Judges in *Butterfield v. Forrester* (a); *Bridge v. The Grand Junction Railway Company* (b); *Davies v. Mann* (c); and *Dowell v. The General Steam Navigation Company* (d). In my opinion, this judgment until it shall be deliberately overturned by a co-ordinate or superior tribunal, ought to be regarded as furnishing the rule to be applied in every similar case; and, in principle, I am unable to see on what grounds the case now before us should be exempted from its application. It is admitted that the instruction given to the jury was in exact accordance with the judgment in *Tuff v. Warman*. I may add, that the judgment in *Tuff v. Warman* was, almost in its very terms, conformable to the direction given to a jury at *Nisi Prius* by the present Lord Chief Justice Erle, in *Dowell v. The General Steam Navigation Company* (e), which, as stated by Lord Campbell (f), was "admitted to have been perfectly correct."

But it is contended that the instruction given to the jury ought

(a) 11 East, 60.

(b) 3 M. & W. 246.

(c) 10 M. & W. 548.

(d) 5 Ell. & Bl. 206.

(e) 5 Ell. & Bl. 198.

(f) p. 205.

to have been qualified by this, that the defendants were not liable unless, *by a new physical act*, they could have avoided the consequences of want of care on the part of the plaintiff. I can find no warrant for such a qualification in any of the authorities which have been cited. If in *Davies v. Mann* the driver of the waggon, if in *Tuff v. Warman* the crew of the steamer, had become, half an hour before the collision, so drunk that their arms were powerless, and if they were still in the same state of drunkenness when the collision occurred, the defendants in each of those cases, according to the argument of the present defendants in support of this exception, must have been exempt from responsibility; because the driver in the one case, and the crew in the other, were so drunk as to be incapable of doing any physical act which could avoid the result of the plaintiff's want of care. Nay, more; if they had been only partially drunk, so as to have retained the voluntary use of their arms, the defendants would be liable; but if they were so thoroughly drunk as to have lost all muscular power, the defendants would be exempt from all responsibility, according to the rule of instruction for the jury suggested by the thirteenth exception. But even if there were authority for qualifying the direction, as required by this exception, the facts of the case, as established by the testimony at both sides, showed that such a qualification would have been wholly unwarranted by the evidence. There was no question for the jury as to the ability of the defendants, or their servants, to have avoided the effect of the plaintiff's negligence, if it existed, by a new physical act of the most obvious kind. If the porter Murphy, instead of returning from the end of the platform, had gone on, with his hand-light, to the carriage which he saw upon the bridge, he could have shown the plaintiff, by his hand-light, where she was, or might have caught her, as she descended, in his arms. On this part of the case, the few plain words of the stoker tell more than a volume of reasoning:—He “was sure, if the lamp was on it (the bridge), she would not have jumped over.”

The case of *Waite v. North-Eastern Railway Company* (a) was

(a) 9 El. & Bl. 719; S. C., 4 Jur., N. S., 1300; 5 Jur., N. S. 936; 28 Law Jour., Q. B., 258.

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cited, as containing *dicta* of some of the learned Judges, laying down absolutely that contributory negligence will disentitle a plaintiff to recover, without any qualification as to the defendant's ability to avoid, by care on his part, the injurious result of that negligence; and it has been suggested by the Counsel for the defendants (as I understand a portion of their argument, though I think this appeared not to have been insisted on throughout), that those *dicta* are inconsistent with the statement of the law, as laid down in *Tuff v. Warman*. The judgment in the latter case was, as I have said, a deliberate judgment, delivered, after time taken to consider, by one of the Members of the Court of Exchequer Chamber, on behalf of them all. In the case of *Waite v. North-Eastern Railway Company*, the Court gave judgment immediately after the close of the argument, the five learned Judges who remained in Court then stating their views. That case was argued and determined on the 4th of February 1859. The case of *Tuff v. Warman* was not cited, though it had been determined on the preceding 18th of June. It was, probably, not then reported; and I observed that none of the Judges who determined the one case, or of the Counsel who argued it, was engaged in the decision or discussion of the other. But, in *Waite v. North-Eastern Railway Company*, either in the Court of Queen's Bench, or in the Court of Exchequer Chamber on the appeal, it was not suggested at the Bar, or from the Bench, that any question existed as to whether the defendants, by any amount of ordinary care on their part, could, at the time of the occurrence complained of, have prevented the effect of the negligence of the person in charge of the infant plaintiff, which negligence was found by the jury to have caused the injury as much as the negligence of the defendants. The evidence, and indeed the patent and undisputed facts, appearing at the trial, presented no such question; and it would have been idle and absurd to send it to a jury. Mrs. Park, who was the grandmother of the infant plaintiff, who had charge of the child (and whose negligence was held to affect the infant plaintiff, as if Mrs. Park herself had been injured, had survived and had sued), was found dead upon the Railway when the luggage-train had

passed, which caused her death, and which injured the infant. There was no evidence of any witness of the calamity; but it was inferred, and the inference was irresistible, that she had passed from the platform, where she obtained the tickets for herself and the child, across the line, when the luggage-train was approaching. She was about to travel from the station (Velvet-hall) to Tweedmouth, by a train which was soon after to arrive on its way towards Berwick. She had frequently passed that way before, and, therefore, knew the usage of the station; which was that, on the approach of the Berwick train, which was to stop at the station, the passengers were called to cross the line (when it plainly could be done with comparative safety, under the eyes of the officials), and enter the train at the opposite side. Without waiting for this intimation, she crossed the line, when a luggage-train was coming up from Kelso (passing in the direction the reverse of that by which the expected train was to approach) at the rate of twenty miles an hour. From the platform the line of Railway was visible for a long distance, in the direction of Kelso. It was perfectly clear, upon these facts, that Mrs. Park rushed into the jaws of death, passing on the rail, either because she had never looked upon the line at all, to see whether it was clear, or (what was far more probable), because she voluntarily chose to incur the risk of passing before the train, and ran, in crossing the line, a sort of race in competition with its speed. Against rashness so great, and carelessness so gross, the strongest and most conclusive evidence would seem to be required, to show that, by any amount of ordinary care on the part of the servants of the Company, or the driver of the engine, the casualty could have been prevented; and of this there was no evidence whatever. Considering, therefore, the observations of the learned Judges, in reference to the subject-matter with which they had to deal, I cannot understand anything which fell from them in a sense inconsistent with the rule laid down in *Tuff v. Warman*; but, if it were otherwise, and if the *dicta* in *Waite v. The North-Eastern Railway Company* were at variance with the judgment in *Tuff v. Warman*, I should not for a moment hesitate between them. I should hold that judgment as unaffected by the observations, however entitled to the highest respect, of the

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learned Judges, before whom the point was not raised or argued, and who had not the advantage of considering the authority of the previous deliberate decision of the Court of Exchequer Chamber, and the reasons on which it was founded. I regard the decision as establishing a canon of the law affecting actions of negligence of the class to which it belongs, laying down a rule for the instruction of juries, which, I believe, approaches in its terms, as nearly as the nature of the subject admits, to what is plain and intelligible to the ordinary understanding of men.

The fourteenth exception is, *a fortiori*, disposed of by the considerations which apply to the thirteenth. It only remains to consider the fifteenth exception. By that exception, the defendants' Counsel required that the jury should be told "that, if they believed the evidence of Andrew and Archibald Ritchie and Eliza Greene, concurring on the point that the train was in motion when the plaintiff Jemima left the carriage, they should find for the defendants." In support of this exception it was urged that, among the bye-laws of the Company, proved to have been posted at the station of Stillorgan (where the plaintiff entered the train), there was one which imposed a penalty of forty shillings upon any person who should leave a train while it was in motion: that this bye-law, being made by authority of an Act of Parliament, had the force of statute law, and that the violation of it disentitled the plaintiff to recover in this action. Now, in the first place, no authority was cited for the proposition that (irrespective of the negligence in the plaintiff, which the violation of such a bye-law may be supposed fairly to indicate) the mere fact of its violation gave to the defendants exemption from all responsibility to carry safely any passenger who should incur a penalty for violating their bye-law. Without express authority, I should find it impossible to assent to a proposition so unreasonable; on the contrary, I should hold that the Legislature, in sanctioning the making of bye-laws, ever intended to superadd, to a penalty for disobedience of a bye-law, immunity to the Railway Company in doing a wrong. If the violation of the bye-law was an act of carelessness, it created, on that ground, an impediment in the way of the plaintiff recovering

damages for injury to which the act contributed; and, in that view, the circumstances under which the plaintiff left the carriage were material; and they were open for the consideration of the jury, under the instruction which they received, in determining whether she had contributed to the injury by her own want of ordinary care. The only other way in which the exception could be sustained would be by treating the act of leaving the carriage, while it was in motion, as an act of such carelessness as precluded the plaintiff from recovering now. The terms of this exception are such that, if there were the slightest motion of the carriage, though it were so slow as to be imperceptible to a passenger standing at the carriage-door, to descend was to exempt the passenger from all right to indemnity for an injury occurring in his descent, and resulting from the negligence of the defendants. It is quite plain, upon the evidence at both sides, that, if the carriage was not (as the plaintiff swears it was) at "a dead stop" when she left it, it must then have had that slow motion which occurs at the moment when the Railway carriage is just ceasing or is just beginning to move. Archibald Ritchie stated "that, "when the train stopped, it was opposite the coping-stone of the "first pier next the station; when it stopped, the door was right "opposite the pier; that they were in the centre compartment of the "carriage." If the door by which the plaintiff left the carriage was, *when it stopped*, right opposite the pier, then the motion must have been, *when she left it*, altogether or nearly imperceptible; for, if she had left the carriage before it had reached that spot, and while the train was moving towards the pier, she could not have gone over either the pier or the bridge, the balustrade of which was beyond the pier, which it joined. If the jury should, upon this evidence, and that of the other witnesses for the defendant, who stated that the train stopped at the bridge, come to the conclusion that, even if there was any motion, it was so slow that it could not be perceived, it would be most unreasonable to treat that imperceptible motion as conclusive evidence of such carelessness as disentitled the plaintiff to recover. The effect of such a direction as that called for by the defendants on the fifteenth exception would have been, that the jury ought to find for the defendants if, when the plaintiff left

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SCOTT stances under which she left it, was a matter proper for consideration
v. in determining whether and to what extent she was guilty of care-
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I believe my Brothers concur with me in opinion that the excep-
tions should be all overruled.

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In this case there are three questions. First; whether, at the close of the plaintiff's case, there was evidence to go to the jury of negligence on the part of the defendants? Secondly; whether, at the close of the case, the Judge ought to have directed a verdict; and thirdly; whether the charge was correct? Concurring, as I do, in the judgment of my LORD CHIEF BARON, I do not intend to say a word with reference to the two first points; but I wish to say a few words with reference to the last of these questions, because I agree in the law as stated by Mr. *Darley* in his able argument, and, as I understood him, by Mr. *Macdonogh* also. In order to sustain an action of this nature, there must be negligence on the part of the defendants; next, that must be the cause of the injury complained of; that is, it must be somewhat but for which the injury would not have happened; but more than that, it must be the proximate cause, and the sole proximate cause. This was the main point insisted on by Counsel for the defendants. It must be a cause continuing to operate up to the moment of the injury, and there must not be a want of ordinary care on the part of the plaintiff, by which the injury could have been avoided. If there be a want of ordinary care of that kind, then such want of ordinary care is, in some cases, called the proximate cause; in other cases, in some degree, the proximate cause, or contributory to the proximate cause. Which of these it ought to be most properly called appears to me to depend upon the circumstances of each particular case. Now let me call attention to the charge. My LORD CHIEF BARON told the jury, first, that the plaintiff was entitled to recover only in case the injury was caused by the negligence of the defendants; secondly,

that the plaintiff was not entitled to recover, notwithstanding the negligence of the defendants, if the plaintiff Jemima Scott herself so far contributed to the misfortune, by her own want of ordinary care and caution, that but for such want of ordinary care and caution on her part the misfortune would not have happened. Is not that in direct terms saying that the negligence of the defendants must be the cause, the proximate cause, and the sole proximate cause of the injury? That is the very law laid down by the defendants' Counsel. Then there was a third proposition stated by my LORD CHIEF BARON; that, although the plaintiff Jemima contributed to the misfortune, by her want of ordinary care and caution, that would not disentitle the plaintiffs to recover in this action, if the defendants might, by ordinary care on their part, have avoided, in the occurrence complained of, the consequence of the neglect or carelessness of the plaintiff. As to the law contained in that proposition, there is not, and cannot be, any complaint on the part of the defendants; for it is only putting more strongly the necessity that the default which is relied on as the foundation of the action must be the proximate cause of the injury. The plaintiff may still recover, if her want of ordinary care in avoiding the consequence of the defendants' negligence be not the proximate cause; that is, in other words, if there intervene a new cause on the part of the defendants. That is the correct law, as is admitted; and the statement has a tendency to show the nature of the proximate cause, in the very sense which the defendants' Counsel ask to put upon it. The objection to this part of the charge, argued before us, was not that it was wrong, but that it was inapplicable to the case, because there was no evidence of any want of ordinary care on the part of the defendants after the supposed negligence of the plaintiff. I am not satisfied that that is so; but even if there were no evidence, and the proposition were right in law, and illustrated the nature of the proximate cause, I doubt if it would be objectionable. But it is a sufficient answer, at all events, to say there is no such exception as this taken to the charge; on the contrary, the exception is that which my LORD CHIEF BARON has stated; you ought not to have told

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the jury generally, as you did; but you ought to have told them that the defendants were not liable unless they could, by the exercise of care, have then, by a new physical act, irrespective of the continuing negligence, so operating and causing the injury, have prevented the consequences of the plaintiff's want of care. There is no authority, that I know of, for such a statement of the law, and none such was cited. The next exception is this; that there was no evidence of neglect on the part of the defendants, operating up to the time of the injury: but if there was evidence of neglect at all in this case, it certainly was of negligence operating up to that time. The last exception is, that the Judge ought to have told the jury that the mere stepping out of the carriage by the plaintiff as deposed to by three witnesses of the defendants, was itself an answer to the action. It is impossible to sustain that proposition. That was entirely a question for the jury, and was properly left to them. It seems to me impossible that, wholly irrespective of the circumstances under which the plaintiff left the carriage, even supposing it to have been then in motion, the Judge could have told them that there was such want of ordinary care as disentitled the plaintiff to recover.

HUGHES, B., concurred.

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May 3, 4, 26.

CLARK and another v. WRIGHT.*

The plaintiff alleged an absolute sale, by sample, of a quantity of guano to the defendant. THE action in this case was brought to recover a sum of £29. 6s. for goods sold and delivered. The defendant pleaded, as to

The defendant alleged it to have been a contract for sale and return.

The guano (a larger quantity than ordered) was consigned to the defendant, and,

* Before PIGOT, C. B., FITZGERALD and HUGHES, BB.

£15s. 9s., for grass and clover seed, payment of that sum into Court; and as to the remainder of said goods, "that the same "were not sold to the defendant, but the same were delivered as "a sample to the defendant, and were, within a reasonable time "after the delivery thereof, found by the defendant to be, and in "fact were, bad and unmerchantable, and the defendant refused to "buy the same; of which the plaintiff had due notice."

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The material issues were—"First; whether the goods were sold "by the plaintiff to the defendant, as alleged?

"Secondly; whether the delivery of the said goods was made to "the defendant only as a sample, as stated in the defence, or in pursuance of a contract for sale and delivery?

"Thirdly; whether, if the goods were sold only by way of sample, the same were bad and unmerchantable, and, if they were, "whether the defendant refused, within a reasonable time, to buy "the same?"

The case was tried in the Consolidated Court, before Hayes, J., in Hilary Term 1860.

The evidence given at the trial is fully stated in the LORD CHIEF BARON's judgment.

At the close of the case, the plaintiffs' Counsel called upon the learned Judge to direct a verdict for them, on the ground that, if it were a sale by sample, as alleged by the plaintiff, there was no proof of the inferiority of the article to the sample; and, if a delivery on sale and return, the defendant, by dealing with the article as he had done, had effectually taken with the goods, and made them his own; so that the plaintiffs were, at all events, entitled to a verdict for such sum as the jury should think the goods worth.

on the day after its arrival, the defendant sent a portion of it to a chemist to be analysed, who made an unsatisfactory report. There was evidence of repudiation by the defendant, and also some evidence of acceptance.

While the guano was being analysed, the defendant sold one bag of the guano, and subsequently sold a second.—*Held*, that the question whether the defendant's acts amounted to an acceptance of the goods was a question for the jury, and was properly left to them.

Held also, that the plaintiff was entitled to a verdict for the value of the two bags sold.

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His Lordship refused so to direct the jury ; but left it to them to say whether this was a sale by sample, or only a delivery on sale and return ; and if the latter, whether the defendant had taken with the goods. The jury found for the defendant, and also found that the value of the two bags sold by the defendant was 15 shillings.

His Lordship reserved liberty to the plaintiffs to move to enter a verdict for them, in case the Court should be of opinion that he ought to have directed the jury as required, on any of the grounds relied on.

Serjeant *Fitzgibbon* obtained a conditional order, in pursuance of the leave reserved, to enter a verdict for the plaintiffs for the invoice price of the goods, or for their value as estimated by the jury, in the case of the two bags, or for the amount of the two bags sold by defendant.

Cause was now shown by—

J. Kernan and W. A. Ezham.

Serjeant *Fitzgibbon* and *H. Devitt*, contra.

For the plaintiff, in support of the conditional order, it was contended that the acts of the defendant, the vendee, amounted in law to an acceptance of the goods, and that this was a question for the Judge at the trial to decide. In the present case the defendant had dealt with the goods, and sold a portion of them after he had, as he now alleged, discovered that they did not correspond with the contract. The question, therefore, of his acceptance of the goods had been improperly left to the jury. At all events, the plaintiff was entitled to a verdict for the amount of the two bags sold. *Harmer v. Groves* (a) ; *Hart v. Mills* (b) ; *Loder v. Kekule* (c) ; *Colu v. Bulman* (d) ; *Harman v. Bennett* (e) ; *Dawson v. Collis* (f) ; *Ross v. Faren* (g), were cited.

For the defendant it was argued, that the question of acceptance or non-acceptance of the goods was properly left to the jury:

(a) 15 C. B. 667.

(b) 15 M. & W. 85.

(c) 3 C. B., N. S., 128.

(d) 6 C. B. 184.

(e) 1 Foa. & Fi. 400.

(f) 10 C. B. 523.

(g) 8 Ir. Com. Law Rep. 46.

Morton v. Tibbett (a) ; *Read v. Hutchinson* (b) ; *Fitzgerald v. Browne* (c). E. T. 1860.
Cur. ad vult. *Exchequer.*

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The judgment of the Court was delivered by—

PIGOT, C. B.

May 28.

This was an action for goods sold and delivered, and also for money demands. As to the money demands there was a verdict for the defendant, and no question arises. As to the goods, the demand was, first, for certain seeds, the amount claimed for which (£15. 9s.) was paid into Court; and, secondly, for fifteen bags of guano. The guano was transmitted, by the plaintiffs, from Liverpool, to the defendant at Monaghan, and delivered there, on the 1st of April 1858, in consequence of a verbal communication which had taken place in the preceding March, at Monaghan, between a traveller of the plaintiff, named Williams, and the defendant.—[His Lordship then stated the pleadings and issues.]—There was a contrariety of evidence as to the import of what passed in the conversation, in March, between Williams and the defendant; and that was the only occasion on which any order was given for the goods. On the 2nd of April 1858, the day after the goods arrived (according to the defendant's testimony), he sent a portion of the guano, for examination, to a chemist, who gave evidence on the trial, and who proved that it was a mixture of guano and gypsum, with a considerable proportion of earth sand. On the 15th of April 1858, Williams, the plaintiffs' traveller, called on the defendant at Monaghan, and demanded the price of the guano. The defendant used, on that occasion, some strong language, indicative of his dissatisfaction in reference to the guano; and he handed to Williams the report of the chemist. On the 17th of April, the defendant wrote to the plaintiff the following letter:—

" 17th April 1858.

" GENTLEMEN—Inclosed I send you copy of Dr. Hodges' report
" of your mixture (not guano), for which I paid 7s. 6d. You will
" please let me know where it is to be sent to. I have been recom-

(a) 15 Q. B. 428.

(b) 3 Camp. 352.

(c) 4 Ir. Com. Law Rep. 178.

E. T. 1860. "mended to publish the report, with the name of the parties it is
Exchequer. "been bought from, and I think it should be done.

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"Yours, &c.,

JAMES WRIGHT."

On the 19th of April, the plaintiffs wrote to the defendant the following letter, in reply:—

"SIR—We have your note of 17th instant, and are surprised
 "after the agreeable dealings we had last year, that, from the ten-
 "of yours, we are likely to terminate. The guano in quality is just
 "the same as you had from us last season; and you will freely see
 "in a short time, the small lot you now hold, which will be far
 "better for both of us than unpleasantness and disputes. This I
 "hope you will, and that you will require more. It is just the
 "same as the sample Mr. Williams sold by."

It did not appear that any reply was given to the letter of the 19th of April, or that any further correspondence took place between the parties. The price of the goods was not paid; and the action was commenced on the 1st of July 1858. It was tried in Hilary Term 1860. The controversy in evidence between the plaintiff and the defendant's traveller, Williams, at the trial (as to what passed in March), was chiefly this:—Williams stated that he showed to the defendant a sample of the guano (a part of what was proved to have been subsequently forwarded), and that the defendant ordered a ton of the guano, saying, that he intended to order also some guano from another Liverpool house, and would have both analysed, and would give the preference to whichever was best. The defendant stated that Williams showed him a sample of guano, saying it was "genuine Peruvian guano," and that he would guarantee it to be such; and that the defendant then said, "If so, he might send ten bags as a sample, and that he (defendant) would have it analysed; and that if it was as he (Williams) represented, the defendant would keep the sample, and give him "an order for 200 bags." The defendant further stated that the quantity sent to him consisted, not of ten bags, which he had ordered, but fifteen. He stated further, that he had caused a second analysis of the guano to be made in January 1859; and the result of this analysis also was proved at the trial. The defendant admitted that

“ while it (the guano) was being analysed, he sold about two bags, one bag this season, at 5s. a cwt.” Evidence was given of the value of the guano. It is unnecessary to refer to any of these portions of the proofs. There was contrariety of evidence, not only as to the terms of the order for the goods, but also as to the quality and value of the goods. There was similar contrariety of evidence as to whether the goods were repudiated or accepted. The proof of the conversation with Williams, on the 15th of April, and of the letter of the 17th of April, was plainly evidence of repudiation. The omission of the defendant to make any reply to the plaintiff’s letter of the 19th of April, and the sale of part of the guano by the defendant, were as plainly circumstances from which the jury might have inferred acceptance. At the close of the case, the Counsel for the plaintiffs called on the learned Judge to direct a verdict for the plaintiffs, on the ground that if this was a sale by sample, as alleged by the plaintiffs, there was no proof of the inferiority of the article to the sample; and if a delivery on sale and return, the defendant, by dealing with the article as he had done, had effectually taken with the goods, and made them his own; so that the plaintiffs were, at all events, entitled to a verdict for such sum as the jury should think the goods to be worth. The learned Judge declined so to direct the jury; but left it to them to consider whether there was a sale by sample, or only a delivery on sale or return; and if the latter, whether the defendant had taken with the goods. The jury found a verdict generally for the defendant. The learned Judge then asked them what was the value of the two bags that had been used? They found it to be 15s. The learned Judge then reserved to the plaintiffs leave to move to enter a verdict for them, in case the Court should be of opinion that he ought so to have directed, on any of the grounds relied on by their Counsel; and it was arranged that the value of the thirteen bags should be taken at the same rate as the two. In pursuance of the reservation of the learned Judge, the plaintiffs obtained a conditional order, to change the verdict into a verdict for the plaintiff, for the full amount of the invoice price of the goods (which was £11. 10s. per ton, and at which they were valued by the plaintiffs’ witnesses); or for the reduced value,

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according to the estimate of the jury, of the entire fifteen bags; or, at the least, for the amount of the two bags which had been sold by the defendant.

In support of the plaintiffs' claim to a verdict for the entire of the guano, it was contended that the defendant, by selling, and so appropriating, a part of the guano, precluded himself from rejecting or returning it; and that this was a matter of law, to be determined by the Judge, and was not a matter to be submitted to a jury. Cases have certainly occurred, in which the Courts have so dealt with conduct of a vendee, clearly showing an acceptance of the goods. In *Harnor v. Groves* (a), the plaintiff, a vendee of goods (consisting of twenty-five sacks of flour), paid for them on delivery; used half a sack, and finding it not such as the person who sold it for the vendor (the defendant) had represented, complained of it to the defendant, who denied the agent's authority to make the representation on which the plaintiff relied as part of the contract of sale. After this, the plaintiff (who was a baker) used two sacks more of the flour, and sold one sack. In an action for the breach of the warranty, alleged to have been contained in the representation, the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit. One of the counts was for money had and received; and the Court, in directing a nonsuit to be entered, held that the plaintiff was precluded from rescinding (or repudiating) the contract, by the manner in which he had dealt with the goods. But Lord Chief Justice Jervis rests his judgment on the ground that, although when the plaintiff found that the flour was not of the quality described in the contract, he might have repudiated it at once, yet, instead of doing so, he used two of the sacks and sold the third. In that case there was no proof of any offer to return the goods, or any other proof of rejection or repudiation; and the evidence of the acceptance of the goods was all one way. So in *Campbell v. Fleming* (b), it was held that a party, induced by fraud to purchase shares in a supposed Joint-stock Company, who, after knowledge of the fraud, had dealt with the shares as his own, was precluded from repudiating or rescinding the contract of sale.

(a) 15 Com. B. 667.

(b) 1 Ad. & Ell. 40.

and recovering the price which he had paid for the shares, notwithstanding his discovery of an additional element of fraud which he had not previously known.

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In *Chapman v. Morton* (a), a question of a similar kind arose upon a plea of set-off in an action for goods sold and delivered. The defendant, the vendee in a former sale of goods made by the plaintiff in the action, had repudiated the goods, on the ground that they were not conformable to the contract of sale; and after stating that the goods (which consisted of oil-cake) were lying at the public granaries, at the plaintiff's disposal, he further stated that, if no directions were given by the plaintiff, he would sell them, and apply the proceeds in part satisfaction of his damages. He had accepted bills (for the price of the goods), which he was obliged to pay, and he sought, in the action in which he pleaded the set-off, to apply, against the plaintiff's demand in that action, the balance between the proceeds of the goods which he had so sold and the amount paid on the bills. Lord Abinger, at the trial before him, instead of sending to the jury a question as to the acceptance of the goods, directed the jury to disallow the set-off, holding the defendant precluded from repudiating the contract by having sold the goods; and the Court upheld his ruling. But in that case Baron Parke rested his concurrence in the judgment on the ground that, "by the concession of the defendant's Counsel, the Court is to say whether there was an acceptance by the defendant or not." But he said, "If it were necessary to decide whether the case ought to have gone to the jury, for them to determine whether the defendant took the goods in the performance of the contract, I should have thought it would have been right that they should have decided that question." In a great variety of cases it has been held that the question of the acceptance of the goods, and also of the repudiation of them within a reasonable time, has been held to be a question for a jury. Many of the cases of acceptance have arisen, not upon the question whether there was such an acceptance as should bind a party to the contract, but upon the question whether there was an acceptance sufficient to let in evidence of

(a) 11 M. & W. 534.

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 WRIGHT. a parol contract within the Statute of Frauds. The distinction between these is pointed out in an able and elaborate judgment of Lord Campbell, reviewing the authorities in *Morton v. Tibbett* (a). But upon the point whether the question was for the Court or for a jury, the two matters appear not to be distinguishable. The question of acceptance was treated as a question for the jury in *Parker v. Palmer* (b), *Edan v. Dudfield* (c), in *Curtis v. Pugh* (d), and in *Loder v. Kekule* (e); although in the last-mentioned case the Court ultimately determined that, from the nature of the action, the pleadings in it and the facts proved, the question of acceptance or non-acceptance, which was left to the jury at the trial, did not arise. It was also so treated in *Bushell v. Wheeler* (f), in Lord Campbell's judgment in *Morton v. Tibbett* (g), and in *Okell v. Smith* (h). The question whether the goods have been returned, or the vendee's election to take them has been made within a reasonable time, is, in general, one peculiarly for a jury, and was left to them in *Bailey v. Gouldsmith* (i), and in *Beverly v. The Lincoln Gas-light Company* (k). Cases may undoubtedly arise in which the matter is so clear, and the evidence so entirely one way, that a jury will be directed to find a verdict for the defendant, or the Judge will nonsuit; as in *Grimaldi v. White* (l), *Groning v. Mendham* (m), *Hopkins v. Appleby* (n), *Milner v. Tucker* (o). In the present case, it is, I think, impossible to maintain that there was not a question for a jury, quite as much, at least, as, according to the opinion of Baron Parke, there was in *Chapman v. Morton* (p), and as there was in several of the cases cited in Lord Campbell's judgment in *Morton v. Tibbett* (q). We are all of opinion that we cannot act against the finding of the jury, so far as the thirteen bags of guano are concerned, which yet

(a) 15 Q. B. 428.

(c) 1 Q. B. 302.

(e) 3 C. B., N. S., 128.

(g) 15 Q. B. 432.

(i) 1 Peake, N. P. C., 56.

(l) 4 Esp. 95.

(n) 1 Stark., N. P. C., 477.

(p) 11 M. & W. 534.

(b) 4 B. & Ald. 387.

(d) 10 Q. B. 111.

(f) 15 Q. B. 442, n.

(h) 1 Stark., N. P. C., 107.

(k) 6 Ad. & El. 829.

(m) 1 Stark., N. P. C., 257.

(o) 1 Car. & P. 15.

(q) 15 Q. B. 435, 442.

remain in the defendant's custody. The case stands differently in reference to the guano which, by being sold by the defendant, was appropriated by him before the action was commenced. That sale cannot be considered in any light as a dealing with the goods for the purpose of examination; the evidence is, that at the very time of the sale of the first parcel, the guano was undergoing analysis. It is possible that the defendant tried a sale of a small part of the goods, in order to ascertain how far he might deal with it as a merchantable commodity. But he did this at his own risk, and subject to the responsibilities of a vendee, having goods delivered to him for the purpose of sale, and appropriating a severable portion of them. That risk is, that he may be held liable for the entire parcel, and that he must be liable for the part which he appropriates. As to that part he cannot repudiate, for he has put it out of his power to restore it. In reference to this part of the case, and, to a certain extent, in reference to the other portions of it, it resembles the case of *Hart v. Mills* (a). There, the defendant ordered of the plaintiff two dozen of port wine and two dozen of sherry, "with the understanding that, if it were not approved by him, he should return it." The plaintiff, instead of two dozen, delivered four dozen of each kind of wine. On the day of the delivery, the defendant, not being satisfied with the quality, returned the whole, except one bottle of the port and one dozen of sherry, and sent with it a letter addressed to the plaintiff. In that letter he adverted to the circumstance that more wine had been sent than he had ordered; but added, that he "should not have been particular about keeping the four dozen if the quality had suited him." He intimated that he would call the following week, "and choose for himself the remainder of the order." The plaintiff brought an action for the invoice price of the eight dozen of wine and of the bottles. The defendant paid into Court the price of the wine which he had kept. The jury gave a verdict for a small sum more than that amount, but less than the full price of the entire. The plaintiff moved to enlarge the damages to the full amount of that price; but the Court refused to do so, and expressed

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(a) 15 M. & W. 85.

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their opinion that the jury ought to have found a verdict for the defendant, for that he was not liable for more than he had retained of the wine. They rested that opinion, certainly, partly on the circumstance that the plaintiff had departed from the order in sending the additional wine; a circumstance similar to that which exists in the present case, for ten bags only of guano were ordered, and fifteen were delivered. In that case, the wine which was rejected was returned, and it was capable of being easily restored. In the present case, the thirteen bags of guano were not actually returned; but the defendant, under the circumstances of the present case, was not bound to undertake the expense and responsibility of sending the guano to Liverpool. The plaintiff having sent it to an inland town in Ireland, where his traveller took the order for the goods, subject to the approbation of the buyer, there was necessarily involved in that dealing the obligation to take these away, or to leave them at the plaintiff's risk, if there was a right to repudiate, and if they were in fact repudiated in due time. This, however, does not apply to the bags of guano which were sold. The liability to pay for these is one so obvious as hardly to need authority. If authority were wanted, it would be found in the case which I have just cited, of *Hart v. Mills*; in *Oxendale v. Wetherell* (a); and in the judgment of Baron Parke in *Read v. Rann* (b). The result is, that the verdict must stand as to the thirteen bags of guano, but that a verdict must be entered for the plaintiff for the value of the two bags which the defendant appropriated and sold.

(a) 9 B. & C. 386.

(b) 10 B. & C. 438.

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BELL v. PARKE.*

May 4, 5.
T. T. 1860.
May 26.

DEFAMATION.—The plaintiff in this case had been an officer in an infantry regiment, of which the defendant was also an officer; and the summons and plaint, in its first paragraph, stated the slanderous words as follows:—"That the defendant, in a certain conversation "which he had, of and concerning the plaintiff, in the presence and "hearing of divers persons, falsely and maliciously spoke and published, of and concerning the plaintiff, the following scandalous and "defamatory words; that is to say, 'only that I' (meaning him "the defendant) 'do not wish my name' (meaning the name of him, "the defendant) 'should be brought in question, I' (meaning him the "defendant) 'would have it proved that he' (meaning the plaintiff) " 'attempted to purloin a gold chain from a house in Dublin' (meaning thereby, and giving it to be understood, that he, the plaintiff, "had been guilty of an indictable offence, to wit, of the attempting "to steal said gold chain.)"

The defendant pleaded, along with other defences, a justification of the truth of the charge imputed by the slander, and also a plea of privileged communication, which latter plea, however, was held bad on demurrer. (*See the case, on the argument of the demurrer, reported ante, vol. 10, p. 279.*)

The case was tried before HUGHES, B., at the Sittings after Hilary Term 1860.

At the trial, it appeared that the plaintiff and the defendant were officers in the 55th Regiment. That, in the year 1858, the defendant had heard, from a woman of the town, that the plaintiff had

presence of third persons, and there was no plea of privilege on the record—

Held (PIGOT, C. B., *dissentiente*), that evidence that it was the duty of the defendant to make the communication to A was not admissible in mitigation of damages.

Semble, where a slander imputes the commission, by the plaintiff, of a particular offence, evidence of an antecedent general reputation of the plaintiff's general bad character, or of his having some vicious habit, leading to the particular act, is admissible.

But *Held* (PIGOT, C. B., *dissentiente*), that this rule does not let in evidence of a general reputation that the plaintiff was guilty of the particular offence charged by the slander.

Evidence of rumours, shown to have been originated by the defendant, is not admissible.

Where the slanderous words were spoken by the defendant in a conversation with A, in the

* Before PIGOT, C. B., and FITZGERALD and HUGHES, BB.

E. T. 1860. attempted to steal a gold chain from her house. The defendant
Eschequer. mentioned this matter to the plaintiff on parade, in the month of
BELL September 1858, when the charge was indignantly denied by the
v. plaintiff.
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A charge was subsequently made against the plaintiff by a carman, with reference to an alleged attempt to deprive him of his fare. This complaint of the carman was investigated by certain officers of the regiment, in what was called a Court of Inquiry, but which did not appear to be a legally constituted tribunal, or to have any proper military jurisdiction; and the members of this Court then drew up and reduced to writing certain charges, founded on the carman's complaint, for the purpose of having same submitted to a Court-martial, to be holden on the plaintiff. These charges were shown to the plaintiff. The slanderous words complained of were spoken in the month of February 1859, in the interval between the holding of this Court of Inquiry and the day fixed for the holding of the Court-martial; and it also appeared that they were spoken by the defendant to the adjutant, in the presence of several officers of the regiment.

The plaintiff resigned his commission before the day fixed for holding the Court-martial had arrived.

The plaintiff's Counsel, in opening the case, stated to the jury the pendency against the plaintiff, at the time of the speaking of the slanderous words, of the carman's charge, and alleged that the imputation made by the defendant was the cause of the plaintiff's resigning his commission.

The plaintiff, who was examined as a witness on his own behalf, swore, upon his cross-examination, that his resignation was owing to the defendant's charge against him.

The defendant's Counsel subsequently tendered in evidence, as a portion of the defendant's case, the charges which had been drawn up for the purpose of being laid before the Court-martial. This evidence was rejected by the learned Judge.

The defendant was examined as a witness on his own behalf, and he swore that he mentioned the charge which was the subject of the slander, to the plaintiff, in September 1858. That he would

not swear that he had not communicated the matter to other persons in the interval between September 1858 and the uttering of the slander; that he would not swear either way, but that he was positive he had not spoken of it out of the regiment.

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An officer of the regiment, who was examined as a witness on the defendant's behalf, was then asked whether he had heard rumours, prior to February 1859, the date of the uttering of the slander, that the plaintiff had committed the particular crime imputed to him by the slander. This question was objected to by the plaintiff's Counsel, and the learned Judge refused to allow it to be put.

The defendant then produced as a witness General Gascoigne, the officer in command of the Dublin Garrison, and proposed to prove, through him, in mitigation of damages, that it was the duty of the defendant, as an officer, to bring under the notice of the adjutant of the regiment the charge against the plaintiff, his brother officer. This evidence was also objected to, and was rejected by the learned Judge.

The jury found a verdict for the plaintiff, with £350 damages.

C. Rolleston having, in Easter Term, obtained a conditional order for a new trial, upon the ground of the rejection of legal evidence, and misdirection, and on the ground that the damages were excessive—

E. Sullivan, with him *W. J. Sidney*, now showed cause.

C. Rolleston, *S. Ferguson* and *J. A. Phillips*, contra.

The arguments of Counsel upon the several points discussed are fully stated in the judgments.

The following cases were cited: *Jones v. Stevens* (a); *Thompson v. Nye* (b); *Waithman v. Weaver* (c); *Vessey v. Pike* (d); *Bracegirdle v. Bailey* (e); *East v. Chapman* (f); *Pearson v. Lemaitre* (g); ——— v. *Moor* (h); *Cooke v. Wildes* (i); *Toogood*

(a) 11 Price, 235.

(c) Dowl. & Ry., N. P. C., 10.

(e) 1 Fos. & F. 536.

(g) 5 Man. & G. 700.

(b) 16 Q. B. 175.

(d) 3 C. & P. 512.

(f) Mood. & Mal. 46.

(h) 1 M. & S. 284.

(i) 5 Ell. & Bl. 328.

E. T. 1860. *v. Spyring* (a); *Taylor v. Hawkins* (b); *Somerville v. Hawkins* (c);
Eschequer. *Rogers v. Clifton* (d); *Padmore v. Lawrence* (e); 1 *Taylor v.*
 BELL
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 PARKE. *Evidence*, ss. 321, 333.

Cur. ad vult.

FITZGERALD, B.

T. T. 1860.
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In this case the plaintiff and defendant were officers in the same regiment. The slander complained of was an oral communication made by the defendant to the adjutant, and in the presence of two or three other officers of the same regiment. Shortly before the uttering of the slander, what has been called a Court of Inquiry had been held by certain officers of the regiment, to investigate a complaint made against the plaintiff by a carman, in relation to fare; and this Court of Inquiry had agreed on submitting certain charges against the plaintiff, founded on that complaint, to the Court-martial to be holden on the plaintiff. At the time when the slander was uttered, a day had been fixed for holding this Court-martial. The charges so agreed on had been reduced to writing, and shown to the plaintiff. The slander the subject of this action had no relation to the matter of those charges. A Court of Inquiry is not a tribunal legally constituted, or having any recognised military jurisdiction. The defence of privileged communication had not been effectually pleaded, so as to enable the defendant to rely on that excuse at the trial, in bar of the action.

It would seem that, in opening the plaintiff's case, his Counsel had stated to the jury that, at the time of uttering the slander, there was pending an investigation into the plaintiff's conduct with reference to some complaint of a carman against him, and had observed on the time so chosen by the defendant for defaming the plaintiff, as aggravating his offence; and that he also represented the defendant's slander as leading to or occasioning the plaintiff's resignation or loss of his commission. At a subsequent stage of the trial the plaintiff swore that the defendant's slander was the occasion of his

(a) 1 Cr., M. & R. 181.

(b) 16 Q. B. 308.

(c) 10 C. B. 583.

(d) 3 Bos. & P. 587.

(e) 11 Ad. & Ell. 380.

resigning his commission; but this, as I understand, was in answer to a question asked him on cross-examination, by the defendant's Counsel.

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On cross-examination of one of the plaintiff's witnesses, the defendant's Counsel elicited the facts of the pendency of a Court-martial on the plaintiff when the slander was uttered; of the holding of a previous Court of Inquiry on his conduct; of the drawing up by that Court of certain charges against him; that those charges had been shown in writing to the plaintiff; and that the plaintiff had resigned his commission before the Court-martial could be held on him.

As part of his own case, the defendant's Counsel tendered in evidence the charges so reduced to writing, and shown to the plaintiff for the purpose of the Court-martial; but the Judge, at the trial, rejected this evidence. The rejection of this evidence is the first matter complained of. Its admissibility has been insisted on, on three grounds:—First; as tending to negative the allegation that the plaintiff's loss of his commission was occasioned by the defendant's slander, and to show that it was occasioned by his unwillingness to meet the charges founded on the carman's complaint, before a Court-martial. Secondly; on the more general ground that, as the plaintiff's Counsel had introduced the matter of the investigation of the carman's complaint, as aggravating the case against the defendant, the defendant was entitled to have the real nature of it shown, and the whole matter fully explained. Thirdly; that the nature of the charges so instituted, after investigation by the Court of Inquiry, formed a material link in a chain of evidence by which the defendant sought to establish, in mitigation of damages, the absence of express malice in the defendant. I am of opinion that this evidence was rightly rejected. That, as a general rule, in an action of slander, imputing to the plaintiff an attempt to commit a particular act of felony, which is the present case, evidence that the charge of another particular offence was made against the plaintiff is inadmissible cannot, I apprehend, be questioned; and certainly its admissibility is not aided by the fact that the charge was made as the result of an inquiry by individuals having no legal

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authority to make such inquiry. The general rule seems to me to be founded on the plainest principles of justice and convenience. If one such charge could be introduced, twenty might; there could be no possibility of the plaintiff's being prepared to meet or to account for such charges; and supposing he could be prepared, the investigation and trial of them would be interminable. I am unable to discover any principle which will admit the evidence as exceptional, on the grounds suggested. But further, as to the first ground, the defendant had all the benefit of the fact that a charge of some kind had been made against the plaintiff; that a Court-martial, in relation to that charge, was pending when the slander was uttered, and that the plaintiff resigned his commission before the Court-martial could be held. If this could, nothing further, as it appears to me, could be legitimately before the jury, to warrant a suggestion that the plaintiff's loss of his commission was occasioned by the pending Court-martial, and not by the slander. As to the second, the statement of the plaintiff's Counsel had no reference to the truth or falsehood, the probability or improbability, of the pending charge against the plaintiff; nor was its value, for the plaintiff's purpose (such as it was), in any degree affected by the nature of the charge. The introduction of such a matter, by the plaintiff, could not warrant the infringement of a general rule of evidence, which precluded the defendant from showing either the existence or the nature of the charge. With the fact of the existence of the charge the plaintiff had supplied him; but this surely could not entitle him to give evidence which would be otherwise illegal as to its nature. As to the third, I am unable to see how the effect, or probable effect, on the defendant's mind, of a fact not otherwise legally admissible in evidence, can render evidence of the fact admissible. If, on general grounds, the fact ought not to be admitted in evidence, to affect the minds of the jury as to the character of the plaintiff, I do not see how it can be given in evidence as properly affecting the mind of the defendant, in regard to the same character. It appears that some months before the uttering of the slander which is the subject of the action, the defendant had communicated to the plaintiff the charge against him, which is the subject of it; the plaintiff had then

denied the truth of it. The defendant, who was examined as a witness on his own behalf, would not undertake to say that he had not communicated the matter of the slander to other persons, in the interval between this communication with the plaintiff and the uttering of the slander to the adjutant, which was the subject of the action, though he swore positively that he had not spoken of the matter "out of the regiment." He then proposed to prove, by an officer of the regiment, that that officer had heard, previously to the day on which the defendant spoke to the adjutant, rumours that the plaintiff had committed the act imputed to him by the slander. This evidence was rejected by the Judge at the trial; and this rejection is the second matter complained of. Its admissibility was contended for on two grounds:—First; it was said that it was evidence of matter properly tending to detract from the general character of the plaintiff, the injury to whose reputation was the gist of the action, and, therefore, properly receivable in mitigation of damages. Secondly; it was said that it was properly receivable for the same purpose, as negating express malice; and that was put thus:—The defendant had first heard that the act imputed to the plaintiff by his slander was committed by the plaintiff, from a woman of the town; he had thereupon communicated what he heard to the plaintiff, as a man of honor ought. On the plaintiff's denial of the fact, he had believed him; and here it was further urged, that the fact of the plaintiff's denial to his brother officer of the charge coming from such a quarter, and the defendant's acknowledged disbelief of it when denied, had been not unreasonably pressed against the defendant by the plaintiff's Counsel. It was then said, that this disbelief was gradually affected, and finally wholly overcome, by the prevalence in the regiment of rumours that the charge was true, while the plaintiff took no step to refute them. In that view, it was said, the existence of these rumours was most material to the question of malice. Then, it was said, came the carman's complaint, the inquiry, and the charge deliberately founded on it, which forced on the defendant's mind the conviction that the time for discharging his duty as an officer, by communicating the subject of the slander to the adjutant, had arrived. These changes in

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the state of the defendant's mind, and the production of them by this natural train of events, from disbelief to doubt, and belief of the truth of the fact imputed to the plaintiff, and conviction of the duty to communicate it, which duty, it was said, really existed, in the defendant so believed, were, it was said, of the utmost importance in negating malice, and drew with them the necessary admissibility in evidence of the series of facts from which, in a natural course of things, they proceeded. I am of opinion that this evidence also was rightly rejected. Whether there be, or be not, any case in which evidence of rumours of the plaintiff's guilt of a fact imputed to him by the slander which is the subject of suit is admissible in evidence is said to be an unsettled question; and in a conflict of authorities we are asked to rule that in this case it was admissible. I am not aware that, where the slander imputes the commission by the plaintiff of a particular act, there is any express authority for the position that rumours of his guilt of that particular act are admissible in evidence.

First; it seems to me contrary to principle that such evidence should be received with the view of detracting from the general character of the plaintiff. A reputation there may be as to general character; and as general character is affected by a slander, it may be natural to show by rumours, or otherwise, what that reputation is: but there cannot, as it appears to me, be reputation as to the guilt of a particular offence, in the sense in which reputation is understood in the law of evidence. So far as I understand the authorities relied on by the defendant, the utmost which they can be considered as establishing is this, that where the slander imputes a course of conduct resulting from some vicious or criminal habit of the defendant, or where it imputes a particular act, evidence may be given of reputation, by rumours of the plaintiff's having the vicious or criminal habit imputed by the slander, or some vicious or criminal habit naturally leading to the particular act imputed; such vicious or criminal habit forms a part of the general character, and may possibly be the subject of reputation. Whether such evidence be admissible, notwithstanding the case of *Jones v. Stevens* (a), it does

(a) 11 Price, 235.

not appear to me necessary to determine here, because that was not the nature of the evidence here offered. But further, it is essential, if evidence of rumours be at all receivable, that it should clearly appear that they were not rumours which the defendant had originated or set a-going; that seems to be established by the case of *Thompson v. Nye* (a). Now, in the present case, the defendant's knowledge of the matter of the charge made against the plaintiff preceded, by five months, his uttering of the slander sued on to the adjutant. He had all the benefit of the fact that the charge was communicated to him by another; but, in the interval, he not only did not deny that he had spread rumours of the charge, in the regiment, but, in my opinion, the fair inference from his testimony was, that he had done so. That being so, and the evidence proposed relating to rumours made by an officer of the regiment, antecedent merely to his communication with the adjutant, and, therefore, leaving room for rumours, in the interval between the defendant's first knowledge of the matter and that event, it was, in my opinion, clearly inadmissible, as detracting from the plaintiff's reputation.

Secondly; it may be said that, in the second view in which the admissibility of the evidence was insisted on, it is immaterial whether the rumours did or did not wholly proceed from the defendant; because the plaintiff's neglecting to take any step to have the truth of them inquired into was calculated to affect the mind of the defendant alike, no matter from what quarter they came. But I cannot but think it would be most unjust to allow the defendant to account for effects on his own mind, by uncontradicted rumours of his own propagation, and then to put those effects to the jury as evidence of his own *bona fides*; and more generally, it seems to me, that it is against principle to admit that as legal evidence of matter affecting the defendant's mind, in regard to the plaintiff's character, which would not be legal evidence to affect the minds of the jury as to the same character.

The defendant produced, as a witness, the general-officer commanding the garrison of Dublin, for the purpose of proving that

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it was the defendant's duty, as a regimental officer, to communicate to the adjutant the matter of the slander in question. The Judge rejected this evidence. It is conceded that it was not competent to the defendant to have proved at the trial a case of privileged communication. In the course of pleading under the Common Law Procedure Act of this country, it has been held that such defence must be specially pleaded. The defence of privileged communication exists in every case of a communication made *bona fide* on any subject-matter in reference to which the party communicating has a duty, if made to a person having a corresponding duty; and the *bona fides* of the communication is to be presumed, where there is no evidence to the contrary. If, then, it was shown that it was the defendant's duty to make the communication of the slander in question to the adjutant of his regiment, as being the person having the duty to receive and to act on it, the defence of privileged communication would *prima facie* be completely established. But then it is said that this is subject to the qualification that the communication be not made in the presence of strangers; and as, in this case, the communication was made to the adjutant, in the presence of other officers, the defence of privileged communication was imperfect. But it is further urged that the existence of the duty, and the *bona fide* intention to discharge it, though there was a failure in the mode of discharging it, were powerful evidence to the jury, negating malice, and going, therefore, in mitigation of damages. The case of *Toogood v. Spyring* (a), as explained by Mr. Justice Patteson, in *Taylor v. Hawkins* (b), shows that the presence of strangers does not necessarily take away privilege from a communication which would be otherwise privileged, though it may form a circumstance to go to the jury as *evidence of express malice* in the communication, so as to destroy that *prima facie* defence. I am of opinion that the evidence tendered, of duty, in this case was evidence which, if admitted, *prima facie* established the case of privileged communication, and, therefore, was not admissible, that defence not having been pleaded; and it would be strange indeed if the circumstance of strangers being present, which was of itself some evidence of express

(a) 1 Cr., M. & R. 181.

(b) 16 Q. B. 308.

malice, should make it evidence to the jury to negative malice. Had that malice been negatived by the jury, the evidence of privileged communication would be complete. Lastly, it was said the damages given by the jury were excessive, and that the verdict ought to be set aside on that ground. The jury, it is said, gave the full value of the plaintiff's commission, £350, in damages. I may doubt, and do doubt, from what I have heard of this case, whether I would have concurred in the verdict for damages to this amount; but the law has made the jury, and not me, the proper judges of the amount of damages. This Court cannot interfere with the verdict on that ground, unless satisfied that the verdict was perverse, or given under some plain misapprehension. I am not prepared to say that I can draw any such conclusion as to it, in a case in which the slander imputed to an officer of her Majesty's army the attempt to commit a felony, and alleged the defendant's capacity to prove it; in which the defendant put a justification on the records of the Court, and persisted, to the last stage of the trial, in insisting that he had made it good, though the defence failed, and no attempt was here made to show that it had not properly, and, as is said on the other side, signally failed.

HUGHES, B.

I concur with my Brother FITZGERALD; and I abide by the opinion which I expressed at Nisi Prius. The reasons which operated on my mind, as well as others of an equally powerful character, have been given at length by my Brother FITZGERALD.

PIGOT, C. B.

I concur in all that my Brethren have said, except as to two matters, and upon those I shall state the views which I entertain. I think the course taken by my Brother HUGHES at Nisi Prius was correct in every respect, except as to two pieces of evidence which were rejected: the one, as to the rumours of the imputed act having been done by the plaintiff; and the other, as to the duty of the defendant to make to the adjutant the communication complained of.

With respect to the first of those pieces of evidence, my impres-

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sion has been, and my practice at Nisi Prius has been regulated accordingly, that, notwithstanding the views expressed in *Jones v. Stevens* (a), evidence of that kind has been received, and ought to be received, at Nisi Prius. It is true, as said by one of the Judges in *Thompson v. Nye* (b), that the cases in which it has been treated as admissible are principally cases at Nisi Prius; but a very large body of the law of evidence in England is founded on rulings made at Nisi Prius; and a series of Nisi Prius decisions, acquiesced in by the parties, and concurred in by successive Judges, constitutes a code of authority which ought not to be lightly shaken.

It has always seemed to me that the admissibility of this kind of evidence is founded upon the plainest principles of reason and justice. A writer who, of all that have written upon the law of evidence, was, if not the best, certainly one of those best qualified to form a judgment upon the evidence admissible in actions for slander, has put what appears to me to be the true views upon this subject in a very few words. He applies it only to general reputation; but it applies equally, in my mind, to general reputation of the act charged. In 2 *Starkie on Slander*, p. 88, the author says:—"General evidence to show that the plaintiff, previously to the alleged slander, laboured under a general suspicion of having been guilty of similar practices, seems in principle to be admissible, as immediately and necessarily connected with the question of damages. He complains of loss of reputation, and that he has been deprived of his character by the act of the defendant. Is not the defendant then to be permitted to show that the plaintiff's character was previously tainted with suspicion, or that he had in fact little character or reputation to lose? To deny this would be to decide that a man of the worst of characters was entitled to the same measure of damages with one of unsullied and unmishled reputation. A reputed thief would be placed on the same footing with the most honorable merchant; a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable *quantum* of injury sustained, a knowledge of the party's previous character is not only material, but seems

(a) 11 Price, 235.

(b) 16 Q. B. 175.

"to be absolutely essential." He then cites the cases familiar to us all, and which are collected in the subsequent publications, 2 *Starkie on Evidence*, p. 641, *Roscoe on Evidence*, p. 545, and 1 *Taylor*, pp. 327, 330. I do not concur with my Brother FITZGERALD in thinking that this is to be limited to general reputation of general bad character, or to reputation of habitual vice, or habitual misconduct. It seems to me that there is no distinction in principle between the admissibility of general evidence of general bad character, and the admissibility of general evidence of a general reputation of the particular crime alleged, in the imputed slander, to have been committed by the plaintiff. It is by putting extreme cases that the application of a principle can often be most clearly tested. Let me put the case that I shall now describe. Suppose this to have happened:—A gentleman employed in a Railway-office is found in the office murdered, and circumstances of the very strongest suspicion attach upon one individual; the case is tried; the facts are fully investigated; the individual is acquitted; but there exists generally, in the community at large, a moral conviction that the party charged is guilty—a moral conviction that the rejection of a piece of evidence perfectly persuasive, if admitted, but, by a wise rule of law held inadmissible on general grounds, has led to the acquittal. He is entitled to the benefit of his acquittal, and to the presumption of innocence which the law casts around one whose guilt has not been proved. No man can be justified in calling him a murderer—nay, the general impression may, if the truth were clearly known, be unjust. But, rightly or wrongly, he has lost his good name; and there exists a general reputation that he was guilty of the specific offence which I have described. The existence of this reputation is (I will further suppose) matter of fact capable of being proved, not in the same manner, but by evidence as strong as any that can be applied to any event that has happened in the presence of witnesses. Is it just or reasonable that a man so covered with the reputation of having been guilty of an atrocious crime should be entitled to as large a measure of damages, for being called a murderer, as a person of unblemished fame, upon whose character the breath

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Exchequer. of law ought to be adopted which would prescribe precisely the
 BELL same measure of reparation for imputed slanders in the case of
 v. each of two persons—one, a reputed murderer of a known indi-
 PARKE. vidual; another, a person who had never been charged with a
 crime. Consider how this affects the very question on which the
 jury are, upon their oaths, to decide. On the proportion in which
 the character of the slandered man is good or bad, the value of
 the thing assailed by the slander (which is that character, and
 nothing else), and the consequent injury to the owner of it, must
 necessarily depend. All that I have just stated is consistent with
 the fact that the individual whose circumstances I have supposed
 enjoyed a perfectly unblemished fame up to the time of the inquiry
 out of which the imputation arose, and was, until then, in every
 respect unassailed; and that he is still without any other impu-
 tation on his character, save that, in the universal opinion of
 the community, he committed one murder. Suppose two succes-
 sive cases presented, in succession, to the same jury—in one,
 the alleged murderer is plaintiff, in the other, the defendant is a
 man without a stain upon his character; I do not think it just
 or reasonable (and I cannot think that it will ultimately be estab-
 lished as the law of England) that the same measure of damages
 should be applied to each.

The cases upon this subject are well known to us. They are
 collected in the text-books; and it appears to me that the great pre-
 ponderance of authority is in favour of the reception of the evidence.
 It is true, that one of the Judges in *Thompson v. Nye* expresses
 an impression against the admissibility of the evidence, but he does
 not decide it to be inadmissible. I do not feel myself at liberty to
 act upon the doubts of Judges, against a series of decisions made
 by other Judges; especially when I find that, in the very case in
 which those doubts are expressed, it was perfectly competent for
 those Judges to ripen doubts into opinions, and to pronounce judg-
 ment in opposition to those decisions. But the learned Judges, in
Thompson v. Nye, who expressed those doubts, guarded themselves
 against the supposition that they were deciding that the evidence

would not be admissible, and confined themselves to a determination (in which I concur) that evidence of this kind cannot be given when the rumours are subsequent to the uttering of the slander. In that case, no one can tell how far the slander has produced the rumours; and, therefore, the Court, in *Thompson v. Nye*, rightly decided that, where the defendant has been proved to have uttered the slander, evidence of subsequent rumours cannot be received. But the case before us is subject to a very different consideration. All that appeared on that subject was, that the defendant would not undertake to swear that he had not spoken of the matter complained of prior to the rumours. I cannot infer, I cannot even conjecture, from that statement, that because the defendant neither swears he *did* speak, nor will swear that he did *not* speak, therefore he *did* speak the words complained of before those rumours. *De non apparentibus et de non existentibus eadem est ratio*; and until the defendant was shown to have uttered certain defamatory words, which could have affected the plaintiff's reputation in the manner supposed, I do not think the evidence ought to have been rejected. I cannot help saying that, I think, the practice is very much to be deprecated, of throwing out from the Bench the particular views of individual Judges, not intended to be either decisions, or reasons for decisions, and calculated, by suggesting doubts which are not intended to be resolved, to create uncertainty in the law. To such expressions, I own, and I say it with all possible respect, I am disposed to pay very little regard; especially when I find one of those Judges saying, "On the general point I give no opinion" (a); and another, "I will go only so far as to say that I do not wish it to be supposed that I am in favour of allowing the question to be put, even in its most limited form; my present impression is against doing so;" and another, "It is not necessary to give any opinion as to the admissibility of the question in a qualified form." Such is the opinion which I entertain on this part of the case now before us. It involves a question of much practical importance in actions for libel and slander.

The other piece of evidence on which a controversy arose may not,

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(a) 16 Q. B. 180.

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perhaps, be quite so important ; but it, too, involves a question which must frequently arise, and will be often material. It was proposed to prove, on the part of the defendant, that it was his duty, as an officer, to make to Captain Dunn the statement complained of. This evidence was rejected at the trial. The fact that it was the duty of the defendant to make the communication was, in my opinion, in this case a most material circumstance to diminish, if not to remove, the inference of malice. Proof of the non-existence of malice in fact constitutes no defence against the legal presumption of malice attached to the uttering of slander. The slanderous words being proved, the malice is presumed, and the defendant is liable for some damages unless he makes a full defence, as by showing that the slander was uttered on a privileged occasion, or by justifying the words, on the ground that they were true. But proof, falling short of either of those defences, may be given, and may be most important, with a view to the amount of the damages, by diminishing the grounds for imputing malignity : and with this view, it appears to me that evidence is admissible to show that the slander was uttered under circumstances under which, if a proper time or place had been selected, it would have been the duty of the defendant to have spoken the words. I do not concur in the opinion that this mere proof of duty would have amounted to a defence of privilege, and that it was therefore properly rejected, since the privilege might have been pleaded, and since there was no issue on a defence of privilege on the record at the trial. It would be necessary, in addition to the proof of duty, that the occasion, as to the time, the place and the persons present, was one which warranted, when the words were spoken, the performance of that duty. It would appear to me that the circumstance of bystanders being present was evidence of malice, to some extent, and would show that the proof of duty would *not* constitute a justification ; and this would be one ground for admitting the evidence, in reduction of damages. It has been said, and very truly, that the mere fact of other persons being present would not, of itself, take away privilege. That is laid down in *Toogood v. Spyring* (a), and

(a) 1 Cr., M. & R. 181.

Taylor v. Hawkins (a). But the meaning of what is said by Baron Parke and Mr. Justice Patteson in those cases is, that it does not necessarily take away the privilege, that a third person should be present; and I can imagine circumstances in which the fact of a third person being present would not be merely evidence of malice, but would, in itself, take away the privilege. Suppose the words here charged had been uttered at a crowded mess, the defendant being at one end of the table, and the plaintiff at the other, I would hold that, quite irrespective of any express malice, the selection of such a place and such an occasion would, as a matter of law, take away the privilege. It would not be a proper occasion for exercising it. If that be so, the statement of duty would not, in itself, and irrespective of other circumstances, amount to justification, and the evidence ought not to have been rejected on that ground. I therefore think this evidence receivable in mitigation of damages. For these reasons, I am obliged to dissent from the views of my Brethren, and to hold that there ought to be a new trial. The majority of the Court being of a different opinion, the cause shown against the conditional order must be allowed.

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THE ATTORNEY-GENERAL v. LORD LORTON.*

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 H. T. 1861.
 Feb. 9.

INFORMATION by the Attorney-General, in Equity, stating, so far as is material, as follows:—The object of this information is to obtain payment of the duty which has become payable to Her Majesty,

other sons in tail male. In the year 1827, A and the defendant, his eldest son, joined in barring the entail of the devised lands; and by the deed leading the uses of the recovery, dated the 17th of January 1827, the lands, including some lands the absolute property of A, were limited to A for life, remainder to the defendant for life, remainder to his first and other sons in tail. Power was given to the defendant, with A's consent, to charge the lands with pin-money, a jointure and portions;

A testator devised certain estates to A for life, with remainder to his first and

* Before PIGOT, C. B., and FITZGERALD and HUGHES, BB.

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LORTON. Lorton (the defendant) to certain real and leasehold property, formerly belonging to his mother's great-grand-uncle, Robert Cutts Harman, the defendant's father's father, Robert Earl of Kingston, and the defendant's father, Robert Edward Viscount Lorton. The said Robert Cutts Harman was the brother of Wentworth Harman, whose daughter, Anne Harman, married Sir Laurence Parsons; and one of the issue of that marriage was Laurence Viscount Oxmanstown, who married Jane King, daughter of Edward Earl of Kingston, and had issue, an only daughter, Frances Harman Parsons, who married the said Robert Edward Viscount Lorton; and the defendant is the eldest son of the said Frances Harman Parsons and the said Robert Edward Viscount Lorton. The said Robert Cutts Harman was, at the time of making his will, and of his death, absolutely seised for an estate of inheritance in fee-simple of certain real property, such as in the Succession Duty Act 1853 is mentioned; that is to say, certain messuages, lands and hereditaments, in the Queen's County; and by his will, dated the 27th day of April 1782, he devised said lands to trustees, to the use of the said Frances Harman Parsons, daughter of the said Laurence Lord Oxmantown, and mother of

and a joint power of revocation and new appointment was given to A and the defendant.

On the 1st of December 1829, the defendant, by his marriage settlement, exercised, with A's consent, the power in the deed of 1827; and, by subsequent deeds, A and the defendant, in pursuance of their joint power of revocation and new appointment, created further charges on the lands; and by a deed, dated the 15th of July 1854, executed on the marriage of B, the eldest son of the defendant, they revoked all the previous uses, and, subject to the incumbrances already created, and to an annuity then granted to B, they conveyed the estates, and certain leaseholds, the property of A, to the use of A for life, remainder to the defendant for life, remainder to B for life, remainder to his first and other sons in tail. Pin-money for B's wife, and portions for his children, were also charged on the lands.

On the 19th of November 1854, A died, and the defendant (the successor) claimed to be entitled, as against the duty payable on his succession, to an allowance, under section 34 of the Succession Duties Act 1853, for the incumbrances charged by himself and A, under the provisions of the indenture of the 17th of January 1827, and the subsequent deeds.—*Held*, that the defendant was not entitled to such allowance; that these incumbrances were "created or incurred by the successor," within the meaning of the 34th section of the Succession Duty Act 1853; and further, that they were "not made in execution of a prior special power of appointment" within that section.

Held also, that the defendant was not entitled to any allowance for income-tax, insurances against fire, or agent's fees.

The jurisdiction of this Court, as a Court of Revenue, to entertain an information at its Equity side, is not taken away by the 13 & 14 Vic., c. 51.

the defendant, at her age of twenty-one, for life, with remainder to her first and other sons in tail male, with divers remainders over.

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Robert Earl of Kingston was, at the time of making his will, and at his death, seised for an estate of inheritance in fee-simple of certain real property, such as in the Succession Duty Act 1853 is mentioned; that is to say, certain lands situate in the counties of Roscommon and Sligo; and by his will, dated the 1st of January 1798, he devised said lands to the use of Robert Edward King, afterwards Viscount Lorton, second son of the said testator, for life, with remainder to his first and other sons in tail male, with divers remainders over.

On the 7th of December 1799, Robert Edward Viscount Lorton intermarried with Frances Harman Parsons, and by his marriage settlement he charged the Roscommon and Sligo estates with a jointure and portions for younger children, under the powers contained in the will of Robert Earl of Kingston; and there was issue of the marriage, the defendant (the eldest son) and other children. In the year 1825, the defendant attained his age of twenty-one years; and, on the 17th of January 1827, a deed was executed, for the purpose of re-settling the estates, whereby, after reciting that it was considered expedient to sell the Queen's County estates, for the payment, so far as the proceeds would extend, of the incumbrances on the Roscommon and Sligo estates, and that the fee and inheritance should be sold, discharged of the life estate of Frances Viscountess Lorton, and that the Queen's County lands had, by a deed of even date, been conveyed to a trustee, that a recovery thereof might be suffered, and the fee and inheritance vested in trustees, in trust for sale, and that it had been agreed that the Roscommon and Sligo estates, together with other lands, stated to have been purchased by Robert Edward Viscount Lorton, should be conveyed to the uses thereafter mentioned; it was witnessed that the said Robert Edward Viscount Lorton and Frances his wife, and the defendant, according to their respective estates, covenanted to levy fines, and suffer recoveries of said lands, to enure, amongst other uses, to the use of the said Robert Edward for life, remainder

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to the defendant for life, remainder to the first and other sons of the defendant in tail male, with divers remainders over; and said indenture also contained a proviso and declaration empowering the defendant to charge said estates with jointures and portions for younger children, subject to the charges in said deed mentioned, and to the debts in the schedule thereto, and to a term of 600 years to secure annuities to the defendant and the said Frances, and the payment of the debts in the second schedule thereto, amounting to £45,687. 1s. 5d., or so much thereof as the proceeds of the Queen's County estates would be insufficient to pay; and said deed also contained a power to the said Robert Edward and the defendant to revoke the uses thereby declared, and to limit new uses. By a deed of the same date, the Queen's County estates were granted to a trustee, to the intent that a recovery might be suffered; and it was agreed that a fine should be levied, to the use of trustees for sale, to the intent that they should sell the same, and apply the purchase-money in discharge of the incumbrances affecting the Roscommon and Sligo estates, and, until such sale, should stand seized thereof to the use of Robert Edward for life, remainder to the defendant for life, remainder to his first and other sons in tail male, with divers remainders over, with like powers of revocation as in the former deed; and, in Michaelmas Term 1827, fines and recoveries were duly levied and suffered, to the uses declared by said two deeds.

On the 1st of December 1829, on the occasion of his marriage the defendant, with the consent of his father, charged the Roscommon and Sligo estates with a jointure and portions for younger children, subject to the jointure and charges created by the deeds of 1799 and 1827, and limited a term of 800 years to trustees, for securing same. The said marriage took effect, and there was issue thereof, Robert Edward King, the eldest son, and other children. On the 10th of September 1840, a disentailing deed was executed, of lands called the Templevany estates in the county of Sligo, devised to the said Robert Edward and the defendant, by the will of Robert Earl of Kingston; and said lands were conveyed to such uses as the said Robert Edward and the defendant should jointly appoint, and, in default of appointment, to the use of Robert Edward for life,

remainder to the defendant in fee; and by another indenture of equal date, containing a power of revocation to the said Robert Edward Viscount Lorton and the defendant, certain terms of years in said lands were limited to trustees, to secure the payment of certain mortgages, charges and incumbrances, mentioned in the schedule thereto.

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On the 15th of July 1854, on the intermarriage of Robert Edward King, the defendant's eldest son, an indenture was executed, whereby the said Robert Edward Viscount Lorton and the defendant revoked all uses and trusts declared of the said several lands, except the trust terms created by the settlements of the 17th of January 1827, 1st of December 1829, and 10th of September 1840, and the mortgages charged by them in pursuance of the powers contained therein; and, subject thereto, the said Robert Edward Viscount Lorton, and the defendant, granted said lands, and also other lands, purchased by the said Robert Edward Viscount Lorton, to trustees, upon trust to sell the same, or any part thereof (except as therein excepted), if the trustees should think fit, for payment of the incumbrances; and until said sale, or after same, as to the part remaining unsold, subject as aforesaid, to the use of trustees therein named, in trust to pay to Robert Edward King, during the joint lives of him and the defendant and Robert Edward Viscount Lorton, an annuity of £1000, and, after the decease of either the said Robert Edward Viscount Lorton, or the defendant, to pay, during the life of the said Robert Edward King, and the survivor of the said Robert Edward, and the defendant, an annuity of £2500, and, subject thereto, to the use of Robert Edward Viscount Lorton for life, remainder to the defendant for life, remainder to Robert Edward King for life, remainder to his first and other sons in tail male, with divers remainders over; and said deed also contained an assignment of certain leaseholds, the property of the said Robert Edward Viscount Lorton, called the Carlingford estate, to be held upon the same trusts; and certain terms of years were thereby limited for the securing of pin-money to the wife of the said Robert Edward King, and annuities, and portions for younger children; and a schedule was thereto annexed, containing a list of

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all incumbrances at that time affecting the lands, except those paid off by and vested in Robert Edward Viscount Lorton, amounting to £152,447. 7s. 9½d., those paid off amounting to £31,248. 12s. 4½d.

Afterwards, and during the continuance of the said dispositions of the said real and leasehold property, and on the 19th of November 1854, the said Robert Edward Viscount Lorton died, after the Succession Duty Act 1853 came into operation, and thereupon the defendant succeeded to the property, as tenant for life, by virtue of the dispositions thereof.

The information then charged that duty was payable by the defendant in respect of his succession to the Queen's County estates devised by the will of Robert Cutts Harman, at the rate of £3 per cent.; and in respect of all the other property, a duty at the rate of £1 per cent.; and that the defendant claimed, as against any duty payable by him, an allowance for certain incumbrances affecting the lands, income-tax, insurances, agents' fees and other matters, the particulars of which were required by the interrogating part of the information to be set forth by the defendant.

Prayer, *inter alia*, that it may be declared that the defendant Robert Viscount Lorton is chargeable with duty, at the rate of £3 per cent., or at some other rate, in respect of his succession to the property in the Queen's County, or elsewhere, devised by the will of Robert Cutts Harman, and with duty, at the rate of £1 per cent. or some other rate, in respect of his succession to the property in Roscommon and Sligo, devised by the will of Robert Earl of Kingston, and also with duty, at the rate of £1 per cent., in respect of his succession to the real and leasehold properties purchased by Robert Edward Viscount Lorton, and that the amount of said duty may be ascertained.

The defendant, by his answer, admitted the pedigree, as stated in the information, and the will of Robert Cutts Harman.

He further admitted the will of Robert Earl of Kingston, and set forth certain powers therein contained, empowering the said Robert Edward Viscount Lorton to charge the said estates with any sum not exceeding the annual sum of £1200, as a jointure for any

woman he might marry, and with any sum or sums not exceeding the sum of £20,000, for the portions of his younger children.

That, at the time of the death of the said Robert Earl of Kingston, the said estates devised by his said will were subject to certain debts, charges and incumbrances affecting the same, and amounting to £108,345.

That by the settlement of the 7th of December 1799, the said Robert Edward Viscount Lorton, in exercise of the powers contained in the will of Robert Earl of Kingston, charged the Roscommon and Sligo estates with the sum of £10,000, as portions for his younger children, and limited to trustees a term of 500 years, upon trusts for the raising of such sum, after the death of Robert Edward Viscount Lorton, or, in his lifetime, with his consent; and, by said indenture, the said Robert Edward Viscount Lorton covenanted to pay off certain debts affecting the Roscommon and Sligo estates, to the amount of £30,000.

That by indenture, dated the 2nd of April 1812, the said Robert Edward Viscount Lorton, in further exercise of the powers contained in Lord Kingston's will, charged the Roscommon and Sligo estates with the further sum of £10,000, as further portions for his younger children; and that there was issue of the marriage, the defendant and six younger children, two of whom died infants and unmarried; and that the said Robert Edward Viscount Lorton, by three deeds therein mentioned, appointed this sum of £20,000 among his younger children.

That, admitting the execution of the two indentures of the 17th of January 1827, the said Robert Edward Viscount Lorton had, previous to the execution thereof, paid off incumbrances affecting the Roscommon and Sligo estates, to the amount of £62,658, being £32,658 over the sum which he had covenanted to pay off by the deed of the 7th of December 1799.

That by the indenture of the 1st of December 1829, executed on defendant's marriage, defendant, with the consent of the said Robert Edward Viscount Lorton, charged the Roscommon and Sligo estates with the payment of the annual sum of £500, by way of pin-money,

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M. T. 1860. and also with a jointure for his intended wife, Anne Gore Booth, *Exchequer*, who was still living.

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That by indenture, dated the 11th day of March 1839, the committees of the estate of George Earl of Kingston, a lunatic, in pursuance of a decree of the Court of Chancery, conveyed to the said Robert Edward Viscount Lorton, and the defendant, their heirs and assigns, certain estates in the county of Sligo, to hold according to the limitations contained in the will of Robert Earl of Kingston.

That, admitting the execution of the two indentures of the 10th of September 1840, by the second of said indentures the estates in the county of Sligo, conveyed by the deed of the 11th of March 1839, were put in settlement, together with other estates, of which the said Robert Edward Viscount Lorton was then seized in fee, or in perpetuity; and that in said indenture was also contained a power to Robert Edward Viscount Lorton, and the defendant, at any time during their joint lives, to revoke the same, and to limit new uses.

That by indenture, dated the 3rd day of January 1850, the said Robert Edward Viscount Lorton, and the defendant, revoked the uses and trusts in the former deeds, save the trust terms created by the indentures of the 17th of January 1827, and 1st of December 1829, and 10th of September 1840, and the trusts thereof, and limited the Queen's County and Sligo and Roscommon estates, and the other lands comprised in the former deeds, subject to said trust terms and the annuities, jointures, charges and incumbrances by said deeds secured, and subject also to the several incumbrances charged thereon, by virtue of the powers vested in said Robert Edward Viscount Lorton, and this defendant, to the uses thereby declared; and, amongst others, upon trust for sale for payment of the incumbrances mentioned, and every other incumbrance which might thereafter be charged on the said lands, by virtue of the powers in said indenture reserved to the said Robert Edward Viscount Lorton, and this defendant, and a joint power was reserved to them to revoke the uses and declare new ones.

That by the indenture of the 15th of July 1854, stated in the information, the said Robert Edward Viscount Lorton, and the defendant, revoked the uses of the indenture of the 3rd of January

1850, and all former deeds, save the several trust terms created by the indentures of the 17th of January 1827, 1st of December 1829, and 10th of September 1840, and the several incumbrances created by the said Robert Edward and the defendant; and said Robert Edward and the defendant appointed all the lands to trustees, upon trust, in manner therein mentioned, to sell and dispose of all or any portion of the said lands, and to apply the proceeds in discharge of the debts mentioned in the schedules, and, until such sale, to stand seised thereof, to the use of the said Robert Edward for life, remainder to the defendant for life, remainder to Robert Edward King for life, remainder, subject to a jointure for Augusta Chichester, and terms of years for securing same, to the first and other sons of Robert Edward King and Augusta Chichester, in tail male, with divers remainders over; and said lands were thereby charged with the annuity to Robert Edward King, in the information set forth, and an annuity of £250, by way of pin-money, for Augusta Chichester, payable during the joint lives of said Robert Edward King, Augusta Chichester and defendant.

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That in April 1856, a petition was filed in the Court of Chancery in Ireland, by the Hon. Laurence Harman King Harman, as administrator of Robert Edward Viscount Lorton, against the defendant and Robert King and others; and that the matter of said petition was referred to Edward Litton, Esq., and an account taken of charges and incumbrances; and that, on the 4th day of June 1859, a decretal order was made in said matter, whereby it was declared that the principal sum of £31,248. 12s. 4d. was well charged on the lands in the petition mentioned, and which were the several lands comprised in the settlement of the 15th of July 1854, and in the first, second, third and fourth schedules to said answer, with interest thereon, from the 19th day of November 1854; and it was further declared, that the said lands were subject to the several charges and incumbrances set forth in the second schedule to said order, and which comprised all the incumbrances set forth in the first schedule to said indenture of the 15th day of July 1854; and it was further ordered, that the assets of said Robert Edward Viscount Lorton were liable for £923. 1s. 6d., the amount of a judgment of Michaelmas Term

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That said order was, on the 9th of December 1859, varied, on appeal, by a declaration that the assets of Robert Edward Viscount Lorton were primarily liable to pay the several judgment debts in the schedule thereto annexed, with interest thereon, from the 19th day of November 1854, until paid, and the interest from said date on the judgment for £923. 1s. 6d., and that the petitioner should give credit to the defendant for all interest paid by him on foot of all said judgments since the 19th of November 1854.

That the principal sum thereby directed to be primarily paid out of the assets of Robert Edward Viscount Lorton amounted to £6815. 7s. 6d.

That Frances Harman Parsons, the mother of the defendant, died on the 7th of October 1841, before the Succession Duty Act 1853 came into operation; and defendant submitted that he was not chargeable with any duty upon the succession to the Queen's County estates, upon the death of Robert Edward Viscount Lorton, and that his succession to said estates was under a disposition or dispositions made by himself, in pursuance of the provisions of the deed of 17th of January 1827, and the powers therein contained; and that, at the time of making such disposition, defendant was entitled to said estates expectantly on the death of his mother, who died before the Act came into operation; and that he admits, and always admitted, that a duty was payable in respect of his succession to all the other estates, at the rate of £1 per cent., after making all just allowances.

That he did render accounts and furnish materials for the purpose of having the succession duty assessed; and that he paid to the Commissioners, on account of said duty, the sum of £765. 15s., for which he claimed credit; and defendant submitted that this Court has no longer jurisdiction to entertain the information, and that same should be dismissed.

The first schedule to the answer set forth the particulars and

annual value of the Queen's County estates, devised by the will of Robert Cutts Harman, and comprised in the indenture of 17th of January 1827, amounting to £843. 13s. 10d.

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The second schedule contained the like of the Roscommon and Sligo estates, devised by the will of Robert Earl of Kingston, and comprised in said indenture, amounting to £15,631. 6s. 4d.

The third schedule showed the annual value of the estates conveyed by the indenture of the 11th of March 1839, comprised in the indenture of the 10th of September 1840, amounting to £2049. 15s. 7d.

The fourth schedule, part 1, contained like particulars of the estates brought, by Robert Edward Viscount Lorton, into settlement, by the indenture of the 17th of January 1827, which had a rental of £59. 13s. 11d.; and the second part of the said fourth schedule contained the like particulars of the several other estates in Roscommon and Sligo, of which Robert Edward Viscount Lorton was seised in fee or in perpetuity, at the execution of the indenture of the 10th of September 1840; and also of the Carlingford estates, settled by the deed of the 15th of July 1854, which latter estates were of the annual value of £407. 8s. 10d.

The sixth part of the fifth schedule contained the particulars of the incumbrances, by way of mortgage, charged upon the estates by the said Robert Edward Viscount Lorton and defendant jointly, in exercise of the powers of revocation and appointment contained in the indentures of 17th of January 1827, 10th of September 1840, and 3rd of January 1850; and further charged thereon by the indenture of the 15th of July 1854, and the trusts thereof; and defendant claimed to be entitled to an allowance for all these incumbrances, which amounted to £62,357. 13s. 10½d. It was upon this claim, and also upon the claim for an allowance in respect of other incumbrances mentioned in schedule 6, created by virtue of the like powers, and consisting of an annuity to the defendant's son, and another annuity, by way of pin-money, to Lady Lorton, together with other small annuities, that the main question arose.

The sixth schedule set forth an account of annuities, taxes, income-tax, fire insurance and other outgoings, in respect of which the defendant claimed to be entitled to an allowance.

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The defendant denies the jurisdiction of this Court to entertain the present suit; but it has been decided in England that this branch of equitable jurisdiction was not taken away from the English Court of Exchequer by the 5 *Vic.*, c. 5 (corresponding with the 13 & 14 *Vic.*, c. 51, relating to the Irish Exchequer): *Attorney-General v. Halling* (a). The other controverted questions will be the allowances to which the defendant is entitled in respect of the incumbrances on the Sligo and Roscommon estates, as against the duty chargeable upon the property. We admit the case made by their answer to the claim for succession duty on the Queen's County estates; we also admit that the defendant is entitled to allowance in respect of all incumbrances created by Robert late Earl of Kingston, or created under powers contained in Lord Kingston's will; but we deny that he is entitled to any deduction in respect of incumbrances created by himself, or created by him jointly with his father, under powers contained in the deeds of the 17th of January 1827, 3rd of January 1850, or 15th of July 1854. At the date of the execution of the first of those deeds, the 17th of January 1827, the defendant was tenant in tail in remainder of all the estates—of the Queen's County estates upon the death of his mother, and of the Roscommon and Sligo estates on the death of his father. The title to the first was derived under the will of Robert Cutts Harman, of the 27th of April 1782, and to the latter under the will of Robert late Earl of Kingston, dated the 1st of January 1798. Upon the 17th of January 1827, the defendant joined with his father and mother in two deeds, barring the entail of all those properties, and re-settling them to the uses stated in the pleadings, and reserving powers to the defendant and his father, and to the defendant, in exercise of which the incumbrances in respect of which allowances are claimed were created. The nature and extent of the incumbrances are admitted. The question

(a) 15 M. & W. 687.

depends upon the 34th section of the Succession Duty Act 1853 (17 & 18 Vic., c. 51, which enacts that, "In estimating the value of a succession, no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, not made in execution of a prior special power of appointment; but an allowance shall be made in respect of all other incumbrances, and also in respect of any moneys which the successor may, previously to his possession, have laid out in the substantial repairs or permanent improvement of real property comprised in his succession; provided that, upon any successor becoming entitled to real property, subject to any prior principal charge, an allowance shall be made to him in respect only of the yearly sums payable by way of interest or otherwise on such charge, as reducing the annual value *pro tanto* of such real property." We submit that the incumbrances in question were created or incurred by the successor, the defendant. The cases decide that where there is a limitation to a person for life, remainder to another in tail, and they join in re-settling the estates, that act is a disposition by the tenant in tail: *The Attorney-General v. Sibthorp* (a); *The Attorney-General v. Braybrooke* (b). Those cases were decided upon the 12th section, which enacts that "Where any person shall take a succession under a disposition made by himself, then if, at the date of such disposition, he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this Act, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession, at the same rate as he would have been chargeable with if no such disposition had been made." The Court held that the re-settlement by the tenant in tail, with the concurrence of the father, was a disposition made by himself. Upon the same principle, we submit that the incumbrances which are the subject of controversy must be considered to have been created or incurred by the successor, because it was the deed he joined in which imposed them upon the estate. Charges created under the power must be considered as if charged by the instrument con-

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(a) 3 H. & N. 424.

(b) 5 H. & N. 488.

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taining the power; but these incumbrances were not made by the late Lord Lorton and the defendant, in execution of a prior special power of appointment; and they are not, therefore, within the exception in the 34th section, which exempts charges "made in execution of a prior special power of appointment." The power in the present case was a general one. The "special" power mentioned in the 34th section is a power limited to a particular class of objects—not one capable of being exercised for the benefit of the successor himself. It is impossible, for the purposes of the present case, to draw any distinction between the 12th and 34th sections; and if *The Attorney-General v. Sibthorp*, and *The Attorney-General v. Lord Braybrooke*, are rightly decided, the incumbrances were created or incurred by the defendant. As to the allowance claimed for income-tax, the Court has to decide between the conflicting decisions of *Re Beresford's Succession (a)* and *Re Elwes (b)*. In the former of those cases, this Court held that the successor was entitled to an allowance for income-tax; but, in the latter, the Court of Exchequer in England arrived at an opposite conclusion. On principle it is submitted that the English decision is the correct one. Income-tax is not a permanent tax. It is not payable at any fixed rate; it is not a tax upon capital, but upon the receipt of the income. Succession duty is a charge upon the land as it stands, and on the capital. There is no reason why the claim for fire insurance should be allowed. It is not a charge upon the lands in any way, and there is no obligation to pay any insurance against fire. Agency fees are strictly not claimed by the answer; but, at all events, they were disallowed in *Re Beresford's Succession* and *Re Elwes*. He also cited *Wilcox v. Smith (c)*, and *The Attorney-General v. Lord Middleton (d)*.

A. Brewster, H. Joy, T. Lefroy and C. Shaw, for the defendant

When the devise of the Roscommon and Sligo estates under Lord Kingston's will first took effect in possession in Lord Lorton, the father of the defendant, they were subject to £108,345; and the

(a) 5 Ir. Com. Law Rep. 408.

(b) 3 H. & N. 719.

(c) 4 Drew. 40.

(d) 3 H. & N. 125.

will of Lord Kingston gave a power of charging £20,000 additional for younger children, which was exercised to the full extent. Lord Lorton, on his marriage in 1799, covenanted to pay off £30,000; and, to the extent of what he paid off, the incumbrances must be considered as wiped out; though, if they had not been, they would undoubtedly have been a charge on the succession. There were still, however, heavy charges on the estates. Under Lord Kingston's will, Lord Lorton was tenant for life, with remainder to his first and other sons in tail male; and, of course, if the title had continued in that state, and if Lord Lorton had survived the passing of the Succession Duty Act 1853, there would, upon his death, have been a succession to his son; but, on the other hand, if the estates had been disposed of to a purchaser, before the passing of the Act, there would have been no succession. The deeds of the 17th of January 1827 opened the estate, and re-limited it to new uses, giving to the father and son a joint power of revocation and new appointment, to such uses as they should think fit, subject only to the existing incumbrances. By the settlement of the 1st of December 1829, the power of revocation was exercised; and the defendant, with his father's consent, created certain charges—£500 for pin-money, a jointure for his wife, and portions for his children. The Crown insist that nothing is to be deducted from the succession duty on account of any one of those charges, but that the defendant is to pay, as if he had succeeded to the property unincumbered with them. Those charges were not created under a power exclusively vested in the defendant, but under one which he could not exercise by himself, and which he did exercise jointly with his father; nor were they, when created, debts of the party. Then came the deed of the 11th of March 1839, conveying, under a decree of the Court of Chancery, the estates recovered in the Chancery suit, to the uses of Lord Kingston's will, and the deeds of the 10th of September 1840, settling those lands, along with others, the property of Lord Lorton. Those deeds also reserved a general power of revocation. The deed of the 3rd of January 1850 revoked the uses of all the estates created by the previous deeds, except certain of the limitations, trust terms and incumbrances specified. The last deed.

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was the deed of the 15th of July 1854. That was a deed for value. The first thing to be considered is, what the parties settled by those deeds? It was decided by the Lord Chancellor that the only thing settled by them was the surplus estate, after taking out the whole amount secured by the trust terms and mortgages, and other incumbrances. If that was all that was settled, it follows that the only thing to which the defendant succeeded was that which was then settled. The parties were purchasers of that; and all this was done by virtue of the power of appointment vested not in one, but in both, and which neither party could exercise for his own benefit. The day after that deed was executed, the trustees might have sold as much of the estates as would have paid off the incumbrances; and, if they had done so, the consequence would have been, that the successor could not have been bound to pay on them; but by reason of the non-execution of the trust, down to the death of Lord Lorton, it is said the defendant must pay the duty on that which goes into the pockets of other people. The difficulty would not have arisen, if it had not occurred to the Legislature that powers might be created after the Act, for the purpose of evading duty; but they did not intend to interfere with arrangements entered into before the passing of the Act. Suppose that, under the provisions of those deeds, the whole income of the estate had been absorbed by incumbrances, would the Crown, nevertheless, be entitled to duty on the gross amount, by reason of acts done long before the passing of the Act? The Legislature have made provision for the case of a person creating incumbrances by his sole act.—[FITZGERALD, B. The hardship you allude to is the same in both cases.]—The 4th section makes a distinction between property taken under a general and under a limited power, charging, in one case, the donee, and, in the other, the appointee. Then comes the 34th section; and, if the incumbrances since 1827 were all created by the son, within the early part of that section the defendant would be liable, unless this case ranged within the exception, “not made in execution of a prior special power of appointment.” We first say that they were not created by the successor; and, secondly, we say that, if they were, they were created in execution of a “prior special power.” What

is that? It is not a general power, nor a limited one, because "limited" power is mentioned in the 4th section. It may be a power special in the manner of its execution. There are two things to be ascertained—the meaning of "special" and of "prior." The power must be both "special" and "prior." The Crown will contend that "prior" means "prior to the title of the successor." The language of the section is ambiguous; but we say it is "prior to the Act of Parliament, any power to be hereafter created," which interpretation would have the effect of getting rid of some difficulties, or, perhaps, "prior to the succession." Secondly; the power must be "special." That may be one for special objects, or one not for the donee's own benefit. The defendant could not charge it for himself; and he could only exercise it with the consent of another party. The point is untouched by authority. *Sibthorp's case* has no bearing upon it; and *The Attorney-General v. Lord Braybrooke* is before the House of Lords. The case is the same as if the father and son had, in 1827, sold the estate out and out, and then taken a re-conveyance to such uses as they should jointly appoint, and, in default of appointment, to the father for life, remainder to the son in tail.—[PIGOT, C. B. You say the case of a joint power is different from that of protector and tenant in tail joining.]—We do; that is the important portion of this case. As to the allowance for income-tax, the Court must choose between the conflicting decisions of *Re Beresford's Succession* and *Re Elwes*.—[This point was subsequently abandoned by the defendant.]—It is not by any means settled that the Court has jurisdiction to entertain a suit like the present, since the 13 & 14 Vic., c. 51: *Attorney-General v. Corporation of London* (a). To enable the Court to impose a tax upon the subject, the language of the Act which is alleged to impose it must be free from ambiguity.

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The *Solicitor-General*, in reply.

[PIGOT, C. B. You need not say anything upon the subject of the Court's jurisdiction. That question is ruled by authority.]—The jurisdiction of this Court is also expressly recognised in 22 & 23

(a) 8 Beav. 270; S. C., 1 H. of L. Cas. 440.

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Vic., c. 21., s. 21. Then, the claim for allowance in respect of income-tax having been given up, the only question is, whether the incumbrances created since the settlement of 1827 are exempted from duty under the 34th section.—[FITZGERALD, B. You have two things to show; firstly, that those incumbrances were created or incurred by the successor; and secondly, that they were created under a prior special power of appointment.]—The first proposition is ruled by *The Attorney-General v. Sibthorp*. It was argued for the defendant that he was a purchaser, but that was the contention of the defendant in *The Attorney-General v. Lord Braybrooke*. Then, as to the exemption. Assuming the defendant to have been the creator of the power, and to have imposed the incumbrances under it, it would be contrary to honesty and the policy of the Act that he should not be charged. But, on the other hand, if he took a succession subject to an antecedent power, with the creation of which he had nothing to do, and took under a liability to the action of the power for a particular object, not for his own benefit, he should be relieved; and therefore we admit him entitled to allowance in respect of the portions charged under the powers in Lord Kingston's will. Force will thus be given to the words "prior" and "special."—[FITZGERALD, B. It is impossible to say that "limited," in the 4th section, means the same as "special" in the 34th. "Limited" may include "special."—] If "prior" had been omitted, a party might have created a power which would swamp the whole succession, and the Act would be nullified; and if "special" had been omitted, the successor might have used the power for his own purposes. The meaning of the word "prior" is shown by the mode in which it is used in the latter part of the 34th section; "upon any successor becoming entitled to real property, subject to any prior principal charge." There the priority meant is evidently a priority to the successor's title. There is no such rule as that the defendant is entitled to the benefit of any ambiguity in the language of the Act: *Lord Salmon v. The Advocate-General* (a).

Cur. ad vult.

(a) 3 Macq. Ap. Cas. 659.

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In this case of *The Attorney-General v. Lord Lorton*, we do not think it necessary to give our reasons at length. We are of opinion that the case is ruled by *The Attorney-General v. Sibthorp* (a), and *The Attorney-General v. Lord Braybrooke* (b); and we give to the 34th section the same construction which in those cases was given to the 12th section. We have drawn up the minutes of a decree on that basis.

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Declare that the defendant is chargeable with and liable to pay succession duty, at the rate of one per cent., in respect of the lands called the Rockingham, Sligo and Templevane estates, the estates specified in the second and third schedules to the defendant's answer. Declare that the defendant is not entitled to any allowance in respect of such succession duty, for or in respect of any incumbrance created thereon, by any deed or deeds, instrument or instruments, executed jointly by Robert Edward King, Lord Viscount Lorton, deceased, and the defendant, subsequent to the date of the deed in the pleadings mentioned, bearing date the 17th of January 1827, or by the defendant. Declare the defendant entitled to allowance under the 34th section of the Succession Duty Act 1853, for or in respect of any incumbrance or incumbrances affecting the said lands at the death of Robert, late Earl of Kingston, or created by his will, or charged upon said lands, or any of them, by any deed or deeds executed in pursuance of any power given or conferred by the last will and testament of Robert, late Earl of Kingston, bearing date the 1st of January 1798. Declare the defendant chargeable with and liable to pay succession duty, at the rate of one per cent., in respect of the lands specified in the fourth schedule of the defendant's answer. Declare the defendant entitled, in respect of such last-mentioned lands, so comprised in the said fourth schedule, to allowance under the 34th section of the

(a) 3 H. & N. 424.

(b) 5 H. & N. 488.

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said Act, for and in respect of any incumbrance or incumbrances affecting the said lands, at the date of the deed of September 10th, 1840, in the pleadings mentioned, or charged upon the said last-mentioned lands by any deed or deeds, instrument or instruments, executed by the late Robert Edward King, Lord Viscount Lorton, deceased, alone, or executed jointly by the said Robert Edward King, Viscount Lorton, deceased, and the said defendant. Declare the defendant is not chargeable with or liable to any succession duty in respect of the lands called the Queen's County estates, specified in the first schedule to the defendant's answer. Declare the defendant not entitled to any allowance for or in respect of any income-tax, insurance against fire or fires, or expenses of agency or the management of the said lands. Refer it to the Master to inquire and report, having regard to the declarations aforesaid, the amount payable by the defendant for succession duty in respect of the several lands aforesaid, after all just allowances. Refer it to the Master further to inquire and report whether there are any, and what, other lands, to which the defendant has acquired a succession within the meaning of the said Act, and the amount of succession duty, if any, payable by him in respect of any such lands, after all just allowances. Let the Master be at liberty to report any special circumstances, and let each party be at liberty to apply to the Court as occasion may require; and reserve the consideration of the question of costs until the return of the report.

NOTE.—Since the decree in the above case was made, viz., on the 19th of March 1861, the decision of the House of Lords, in *Lord Braybrooke v. The Attorney-General*, has been pronounced, affirming the decision of the Court of Exchequer in the same case, so far as it affected the question involved in the above report.—[REP.].

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MAGEE v. MARK.*

Nov. 3.
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Feb. 9.

This was an action to recover penalties under the Corrupt Practices Prevention Act 1854 (17 & 18 Vic., c. 102). The summons and plaint contained several counts, all founded on an alleged promise by the defendant to give a bribe to the plaintiff, an elector of the borough of Newry, if he would vote for one Q., a candidate at the election of a Member for that town, held in May 1859, or if he would abstain from voting. There was no count for actually giving a bribe. The defences pleaded were traverses of the alleged corrupt agreement. The cause was tried before the LORD CHIEF BARON, at the Sittings after Hilary Term 1860.

The case for the plaintiff was ultimately rested on the second issue, which was, whether the defendant agreed to give money to the plaintiff, in order to induce him to refrain from voting? The plaintiff and his son swore that two sovereigns were actually given in part payment of the bribe; and the son swore that an I O U for £18 was agreed to be given. This evidence was objected to by the defendant's Counsel, upon the ground that no payment of money was alleged by the plaint; but was received by his Lordship. The plaintiff's case, as to the alleged bribery, rested upon the uncorroborated evidence of himself and his son; and their evidence directly conflicted with the testimony of the defendant, and the witnesses examined on his behalf.

At the close of the case, Counsel for the defendant called upon his Lordship to tell the jury that, as the demand in the action was founded on an offence for which an indictment would lie, and, as the plaintiff and his son were accomplices in the offence, a jury could not safely act on their testimony without corroboration; but his Lordship refused so to do. Counsel for the defendant also called upon his Lordship to direct the jury that, if they entertained

In an action for penalties, under the Corrupt Practices Prevention Act 1854, the bribery imputed by the plaintiff was a promise of money for a vote, or to abstain from voting—*Held*, that evidence of actual payment of money was admissible.

The evidence for the plaintiff, in support of the alleged bribery, rested solely upon the evidence of accomplices.—*Held*, that the jury were rightly directed that they might find for the plaintiff upon such testimony, though uncorroborated.

Held also—FITZGERALD, B., *dissentiente*—that in this action the Judge was not bound to tell the jury, by analogy to the practice in criminal cases, that the defendant was entitled to the benefit of a doubt in the evidence.

* Before PIGOT, C. B., FITZGERALD and HUGHES, BB.

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a reasonable doubt of the defendant's guilt, they ought to give him the benefit of the doubt, and find a verdict for the defendant. The requisition also his Lordship refused to comply with; and, in reply to a question from a juror (at what precise stage of the case it did not appear), whether they were to deal with the case as a criminal one, by finding for the defendant on a doubt, his Lordship told them that they were not to do so, to the extent of finding for either party upon a doubt. The LORD CHIEF BARON told the jury that, in criminal cases, though a verdict might be founded upon the uncorroborated testimony of an accomplice, yet Judges were in the habit of advising juries not to convict upon such evidence uncorroborated; that, in the present case, he did not give them that advice, but that the charge was one on which an indictment might be founded, and that, on the trial of such an indictment, he would give that advice; that the evidence of the plaintiff ought to be received with the utmost jealousy; but that his credit was for them. He further told them that he would not advise them to give a verdict for either party upon a doubt; but that the affirmative of the issue was on the plaintiff, and that they ought not to find for him unless they believed, and were satisfied of the fact, that the alleged promise was made.

The judgment of the LORD CHIEF BARON contains a full statement of the charge, and the evidence at both sides.

The jury found for the plaintiff on the second issue, finding one penalty of £100. The other issues were found for the defendant.

F. Macdonogh having obtained a conditional order to set aside the verdict, and for a new trial, on the ground of misdirection, and the reception of illegal evidence, and because the verdict was against the weight of evidence—

R. Armstrong and *D. C. Heron* showed cause.

They contended that the payment of the money was evidence to sustain the allegation of a promise to give a bribe, as showing that the promise had been in fact acted upon. Secondly; that the present was a civil case; and that, even if it were to be considered a criminal proceeding, a jury, as a matter of law, might act upon the

uncorroborated testimony of an accomplice. That in practice juries were usually advised not to convict upon such testimony; but that this was a rule of practice, and not of law: *Regina v. Stubbs* (a). That, at all events, the point was ruled in *M'Clory v. Wright* (b). Thirdly; the rule acted upon by Judges in criminal cases, *in favorem vitæ*, that the party accused ought to have the benefit of a doubt, had no application to a civil proceeding; that there was evidence on both sides, and that it was the duty of the jury to find a verdict upon the balance of testimony.

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F. Macdonogh, J. E. Walsh and William B. Kaye, contra, contended that the evidence of payment of money was inadmissible upon the pleadings. Secondly; that the jury should have been advised not to find upon the uncorroborated testimony of the informers. That the ground of the decision in *M'Clory v. Wright* was, that the silence of the defendant who might have been, but was not, examined, amounted to corroboration. That the action was a criminal proceeding. The statute made the offence the subject of a prosecution for a crime, or of an action for a penalty. The proceeding, in both instances, was criminal in its nature, although the consequences might be different. Lastly; the direction of the learned Judge, that the jury were not to find for either party upon a doubt, amounted to a direction that, in a given state of facts, they were to find no verdict at all. *Thurtell v. Beaumont* (c) showed that, in a proceeding like the present, the defendant was entitled to the benefit of a doubt.

The following authorities were also referred to:—*Chalmers v. Shackell* (d); *Willmet v. Harmer* (e); *Baker v. Rusk* (f); *Davy v. Baker* (g); *Williams v. The East India Company* (h); *The Great Northern Railway Co. v. Rimell* (i); *Hall v. Green* (k).

Cur. ad. vult.

(a) 7 Cox, Cr. Cas., 48.

(b) 10 Ir. Com. Law Rep. 514.

(c) 8 B. Moore, 612; S. C., 1 Bing. 340.

(d) 6 Car. & P. 475.

(e) 8 Car. & P. 695.

(f) 15 Q. B. 870.

(g) 4 Burr. 2471.

(h) 3 East, 192.

(i) 18 C. B. 575.

(k) 9 Exch. 247.

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This case was tried before me at the Sittings after Hilary Term 1860. The action was brought under the Corrupt Practices Prevention Act 1854 (17 & 18 Vic., c. 102, s. 2), to recover penalties for bribery, in reference to the last election for the borough of Newry. There were several counts, but the question was narrowed at the trial to the claim, in one count, founded on an alleged promise of the defendant to the plaintiff, an elector of Newry, that the defendant would give the plaintiff a sum of money if the plaintiff would abstain from voting for Mr. K., one of the candidates at the election. The paragraph or count which stated this promise did not, nor did any part of the plaint, allege that any money was paid. The evidence extended to very considerable length. I shall state the portions of it which appear material to the questions argued before us.

The plaintiff was a labourer, and the defendant was a grocer, both residing in the town of Newry. The plaintiff deposed that a person named M., some time before the election, went with him to the defendant's house, introduced the plaintiff to the defendant, and asked him "to do all he could for Jemmy" (meaning the plaintiff); and that the defendant said, "he would." The plaintiff further stated, that in some time after, and before the election, he had an interview with the defendant, behind the gate of the Custom-house yard in Newry, at which, partly by a sign signifying the number 20, and partly by words which passed between them, the defendant intimated that £20 would be given for a vote; and that the plaintiff assented. He further deposed that, on the evening or night before the election, the defendant came to the plaintiff's house, and that it was there arranged between them that the plaintiff should go, that evening or night, to the house of the defendant. He further stated that he (the plaintiff) and his son, who was blind, went on that night to the house of the defendant. He then deposed to the following effect:—Having entered by the hall-door (the shop being closed), they were conducted by the defendant into a parlour or room behind the shop; they had no talk at first. The defendant left them, and while he was away they knocked at the table, and were served by

the defendant's wife with a glass of wine and a glass of whiskey, for which they did not pay. In a short time the defendant returned, and told the plaintiff that he could get two sovereigns, when going out from the defendant's house, and £18 in twenty-one days. The plaintiff required £5 in hand. The defendant said he had to go and consult others, and went out. After some time (during which plaintiff and his son remained alone in the room), the defendant returned, and said the plaintiff would have £2, and no £5; and that plaintiff would get two sovereigns, which would be given to his son, going out from the house, by a person unknown to the plaintiff or to the defendant; and that he was to get the £18 also from a person unknown to either. This was to be for sinking his vote at the election. He then stated that he and his son left the house, his son being conducted by the defendant. His son (who was examined at the trial, and who also proved the promise) deposed that he received two sovereigns in going out with his father; and that they were placed in his hand by a person whom he did not know. The son varied from the father, by stating that there was also a promise of an I O U for the £18, which I O U, however, was not given. There were some other discrepancies in the details of their testimony. It further appeared in evidence that, early on the morning of the election, it was publicly announced that Mr. K. had retired; and that another gentleman (Mr. M'B.) would contest the seat, as a candidate, with Mr. Q., the candidate whom Mr. K. had opposed. The plaintiff deposed that on that morning a message was delivered to him by a person named Stephenson; and Stephenson swore that he delivered such a message at the defendant's desire. The message (as stated by Stephenson) was, "to tell Jemmy Magee that Mr. K. had resigned, and that Mr. M'B. had set up in his place, and that "he need not be uneasy; that all was right, and to come over to "him." The plaintiff further stated that, after the election, he received, for some time, various small quantities of goods on credit, at the defendant's establishment—an accommodation which he swore had never been given before—and that he, on one occasion, received a sum of 4s. 6d. in cash, from the defendant's shop-boy; which, however, was not clearly shown to have been given by the defend-

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ant's authority. The plaintiff stated one or two communications which he said took place between him and the defendant after the election, from which an inference might have been drawn confirmatory of the previous alleged understanding respecting the bribe. It is unnecessary to refer to them in detail.

The defendant, who was examined on his own behalf, and M. who was also examined on the part of the defendant, stated that M. had come to the defendant with the plaintiff some time before the election. Defendant stated that M. called for some whiskey, for which he paid; and that M. said to him, "Here's Jemmy Magee, a neighbour," or something to that effect; and asked defendant "could he do anything for him?" that defendant turned round to plaintiff, and asked him, "whether he wanted money?" that plaintiff said, "he wanted either £20 or £25;" and that defendant replied, "there was nothing about money matters"—"that he knew nothing about money matters at all." That the word election was not used, but that defendant knew very well what he meant: that they all left the room together. M. deposed to the following effect:—He met the plaintiff on the Sugar Island bridge, and asked the plaintiff to come down to Mark's (defendant's), to give him a treat; the plaintiff had been importuning him for some time before. They went to Mark's, where M. got a glass of whiskey for the plaintiff, and half a glass for himself. Mark asked the plaintiff what he wanted? The plaintiff said, either £20 or £25. Mark replied, that he could do nothing for him in the way of money, or something to that effect. As to the interview behind the gate of the Custom-house, the defendant, in his evidence, stated to the following effect:—The defendant was going towards the packet-office, about ten or twelve days before the election, when the plaintiff joined him, and went along with him. The defendant went inside the gate, without any invitation to the plaintiff to accompany him. The place behind the gate was used for certain purposes which I need not describe. The plaintiff followed him and stood behind him, and asked, "could he" (defendant) "do anything for him?" saying something about the election. The defendant asked him, "what did he want?" The plaintiff said "£20." The defendant

told him, "he had nothing to do with money matters at all." The defendant further stated, that he did not think anything else passed; and that he then left the place. The defendant positively contradicted the account given of this conversation by the plaintiff in his evidence; and further stated, that it occurred after, and not before, the visit of the plaintiff, and of M., to the defendant's house. The defendant admitted that he went to the plaintiff's house on the evening before the election; and stated that he left a message there, with the plaintiff's wife, desiring that the plaintiff should come to his house; but he stated that he did not see the plaintiff upon that occasion, though he thought he heard a voice from within, intimating that the plaintiff was to come. The defendant further stated, that plaintiff and his son did come to his house; that they were in the parlour; that the defendant did leave them, on two occasions, together in the parlour; and that on one of those occasions he went and stood, for twenty minutes or half an hour, at or about the hall-door; and, on the other, went out to unlock the back-gate; and that after some time, the plaintiff and his son did go away by the back-gate. With respect to what passed between him and the plaintiff, he stated that, after he returned to the parlour, he asked the plaintiff "something about voting;" and plaintiff then "said he would not vote against K., that K. was a townsman;" and "that he would never vote for any man unless he was paid for it." That defendant told him, as he told him before, "if he wanted money, that he" (defendant) "had nothing of the kind." Defendant stated that this was the substance of what passed; and that he did not remember anything further particular as having passed. The defendant further stated that, when he went to the parlour, after he had unlocked the gate, he "said something to the plaintiff about voting for Q., asking would he vote for Q.;" but he directly contradicted all the plaintiff's statements in reference to the promise of money, positively swearing that he made no such promise, and denying all participation in the alleged giving of the two sovereigns. He stated that he had observed crowds in the street, and had seen a person named Cardwell, who was interested on behalf of Mr. K., passing in the street, up and down, with some persons whom he (Cardwell) had employed; that

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he (the defendant) asked the plaintiff whether he wished to go on the back way, stating to him, as a reason for so asking, that there were a good many people in the street; that the plaintiff said, he did not care which way he went out; and the defendant then described the departure of the plaintiff and his son, the defendant taking the son's arm and conducting them through a passage out the back way. The defendant stated that, during the plaintiff's visit, he had no communication or consultation whatever with any other persons, and had no communication with any person as to giving the plaintiff money. On his cross-examination he was questioned as to his motives in desiring that the plaintiff should come to his house. He admitted that he was anxious to get the plaintiff to vote for Mr. Q. He said, that "he brought him over that night to try and persuade him to vote for Q." He admitted that, without asking whether he would do so or not, he left him and his son in the parlour, without saying anything about it, while he (the defendant) remained away at the hall-door; that he could not say why he did so, but that the probability was, it was because he saw them coming together; and added, that he now recollected, and that that *was* his reason. Being asked what was the influence that he had to exert on the plaintiff, he said, "the reason was this, I had heard—this was from him—that he had said that he had been "promised money by K.'s side, and did not get it, and that was the "cause I asked him; I told him myself. You know you were promised money at the last election, and did not get it, and revenge "yourself. I did not recollect that till this moment." Defendant stated, in another part of his evidence, that he "had heard, in Mr. "K.'s committee-room, in 1857, that Magee was a fellow that would "sell his vote;" and being subsequently asked, "how did you expect you could persuade him to vote for Mr. Q.?" He said, "I supposed it possible he might vote for revenge; I heard he would." With reference to the message through Stephenson, he gave the following evidence on his direct examination:—"After I heard that "Mr. K. had retired, and another candidate appeared, I sent a messenger by Stephenson. I told him to go and tell Magee that Mr. K. "had retired, that Mr. M'B. had taken his place, and to come to me

"I either said 'it is all right,' or that 'he was all right,' something H. T. 1861.
 "to that effect; for I did not recollect it until somebody told me, Exchequer.
 "within the last fortnight, that Stephenson was to come up. He MAGEE
 "had, either once or twice, said that he would not vote against v.
 "K. It was in relation to that that I used the words 'it is MARK.
 "all right,' or 'he is all right.'" Q—"Do you remember if you
 "used the words 'that he need not be uneasy,' or anything of
 "that description?" A—"I do not remember it at all." On his
 cross-examination he said that he would not swear that he did
 not use those words. He further stated:—"I told Stephenson I
 "wanted to see him; I meant to convey, at my own house; but
 "I did not *state* that. By 'all right' I meant that he would not
 "break his word; that Mr. K. was not a candidate; he had
 "promised he would not vote against K.; and then, when K.
 "had retired, I thought there was a possibility that he might then
 "vote for Mr. Q."

The plaintiff, on his cross-examination, admitted that he had received money at two former elections, at each of which he voted; that he received £10 at one, after a previous promise, and £5 at the other, which had not been promised before he voted.

I do not think it necessary to refer further to the evidence, which comprised a considerable detail of circumstances, relied on at both sides, in support of the cases made by the respective parties, through their Counsel, at the trial. I have stated enough to show that there was not only contrariety of evidence, but a large body of conflicting evidence, involving directly the credit of the witnesses, on which the jury had to decide. It was perfectly plain that, if they believed the plaintiff, they were bound to find for the plaintiff; and, if they believed the defendant, they were bound to find for the defendant.

The Counsel for the defendant, both in his address to the jury, and in calling on me to give directions to the jury, insisted that the evidence of the plaintiff and his son, in reference to what took place at the defendant's house, was uncorroborated; and that as, according to their own statements, they were accomplices in the offence of bribery, I ought to advise the jury that, without

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corroboration, the jury ought not to act on their testimony; on the ground that the demand in the action was founded on the charge that the defendant had committed a criminal offence; and if the defendant were on trial upon an indictment for that offence, such advice would be given by the Judge. On the same ground the defendant's Counsel called upon me to direct the jury that, if they entertained a reasonable doubt upon the evidence, they ought to give the benefit of that doubt to the defendant, and find a verdict for him. I refused to comply with either of these requisitions. Counsel for the defendant also called on me to withdraw from the jury all evidence in reference to the payment of two sovereigns, and promise of an I O U, on the ground that such evidence was not legally admissible on the pleadings. This I declined to do. In charging and summing up to the jury, I commented upon the evidence, and read portions of it affecting the case made at each side. I told the jury that, in criminal cases, though a valid verdict might, in point of law, be given upon the uncorroborated evidence of an accomplice, yet Judges were in the habit of advising (and juries, though not bound so to do, were in the habit of acting on such advice) not to convict upon such evidence, uncorroborated. I told them that, in the present case, I did not give them that advice; but I told them that the charge in the present case was the same as that on which an indictment might be preferred against the defendant; that, on the trial of such indictment, I would give such advice; and that they were at liberty to regard the practice of Judges to which I had referred, as indicating the jealousy and scrutiny with which the evidence of an accomplice ought to be considered by a jury. I told them that, with respect to the plaintiff, I thought I ought to express my own opinion that, when the plaintiff confessed that at one of two former elections he engaged to vote, for money, and was paid for his vote, that at another he voted, without such promise, but afterwards accepted payment for his vote, and that at the last election he had (according to his own statement) promised to refrain from voting, on a promise made to him of money, part of which was, as he alleged, paid, and now used

in this action because he did not receive the entire of the alleged bribe—such a man came forward, with such a taint upon his testimony, that it ought to be received with the utmost jealousy by a jury; still his credit was for them; and they would give such weight as they thought fit to the topic, urged by the plaintiff's Counsel, that a man may be guilty of bribery, who would not be guilty of perjury. I then pointed out to them that, on the part of the plaintiff, it was alleged that there was corroboration of the plaintiff's evidence, not only in some matters which were inherent in the circumstances themselves, and were common to the cases made at both sides, but also in certain other parts of the evidence; while the defendant contended that there was similar corroboration of his denial of the plaintiff's allegation. I recapitulated some of these matters, and also some of the arguments of alleged probability and improbability, which appeared to me to be chiefly relied on at both sides; and I left the case to the jury, as one to be determined by the credit which they should attach to the witnesses at the one side or the other. I told them that they were to determine upon the issues, yea or nay, and that I would not advise them to give a verdict for either party upon a doubt. But I told them that the affirmative of the issue was on the plaintiff, and that they ought not to find a verdict for the plaintiff, unless, on the evidence, they believed, and were satisfied of the fact, that the alleged promise was made.

The plaintiff ultimately rested his case on the second issue, as to the promise to give money for forbearing to vote. The first and third issues were not sustained by the evidence. The plaintiff submitted to a verdict on the fourth. The jury found a verdict for the plaintiff (in the affirmative) on the second issue, finding one penalty of £100, and finding for the defendant on the other issues.

I was applied to by Mr. *Macdonogh*, for the defendant, on the day after the trial, to give the defendant the benefit of the objections as points saved. I stated that I apprehended that could only be done where, if the point saved were ruled in favour of

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the party making the objection, a verdict could be entered for him, and not where the result must be a new trial. I expressed my own wish that, in order to save the great inconvenience and expense of a bill of exceptions, any question which was deserving of an argument should be raised, and treated by the Court, if it was possible, as a point saved.

The case has been argued before us, on showing cause against a conditional order for a new trial, on the ground that the verdict was against the weight of evidence, and for misdirection, on the grounds on which the defendant's Counsel objected to the charge. First; as to the application to set aside the verdict, as against the weight of evidence. I have stated what appear to me to be the chief material parts of the evidence at both sides, for the purpose of showing that there was that contrariety of evidence on which it is the proper and the exclusive duty of the jury to decide. I should not have been dissatisfied with the verdict, if it had been the other way; because the credit of the witnesses was a matter peculiarly for the consideration and decision of the jury, and because I think there were strong grounds of impeachment of the credit of the principal witnesses for the plaintiff, and especially of the plaintiff himself. But neither can I say that I am dissatisfied with the verdict of the jury, by which they in effect declare that they believe the plaintiff's account of what took place at the defendant's house. In truth, there was much at both sides to be considered by the jury; but the evidence of Stephenson, as to the message sent by the defendant on the morning of the election (which message, with the omission of one phrase, that the defendant did not remember, but did not deny, the defendant admitted that he sent)—that message being sent to a man whom the defendant knew to be capable of being bribed, and who had repeatedly solicited the defendant to bribe him—seemed not easily reconciled with the absence of any previous arrangement or understanding between them—an arrangement and understanding which the plaintiff affirmed and the defendant denied. This was the more material, by reason of the defendant's allegation, in his evidence, that they separated the night before, with a refusal

given by the plaintiff to the defendant's proposal, that he should vote for Mr. Q. The very circumstance of the defendant's solicitation of the plaintiff to come to his house the evening before the election, coupled with the admitted knowledge of the defendant not only that the plaintiff wanted to be bribed, but that he wanted to be bribed by the defendant himself, was a fact tending strongly to aid the inference that the defendant would not have given the invitation, and would not have detained the plaintiff so long at his house, if he intended to rely on mere persuasion. It appears to me that these were ample grounds to warrant the jury in arriving at the conclusion which they declared by their verdict. We are all of opinion that we cannot set aside the verdict as against the weight of evidence.

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In reference to the objections to the charge, the defendant's Counsel, in the first place, contended before us that the evidence of payment of the two sovereigns ought not to have been received, because the payment was not alleged in the plaint. No authority was cited to sustain this objection. The offence charged (that of promising money for forbearing to vote) would be proved by the evidence establishing the promise alone. The statute imposes the penalty for either a gift of money as a bribe, or a promise to give it. The proof of the part payment was plainly admissible as evidence of an act of the defendant, done in furtherance of the promise charged. If proved to the satisfaction of the jury, it would be evidence, and persuasive evidence, in corroboration of the testimony of the witnesses who deposed to the promise. It is unnecessary to observe further on a proposition so plain; but I may observe that, in *Cooper v. Slade* (a), this very question appears to have been presented at the trial by the charge of the learned Judge. There were two counts (the seventh and eighth); the former, a promise to pay a voter's expenses in coming to vote; the latter, on a payment of money for that purpose. There was evidence both of the promise and of the payment. The learned Judge, at the trial, told the jury in effect that, if they believed there was a promise, they should find for the plaintiff on the seventh count, and, if they believed there was a payment of the expenses, they should find for the plaintiff on the

(a) 6 H. of L. Cas. 746.

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eighth. If the defendant, in the present case, be right in the objection with which I am now dealing, the Judge at the trial, in *Cooper v. Slade*, ought, on the seventh count, to have directed a verdict for the defendant. The House of Lords upheld the ruling of the learned Judge, and overruled the exceptions. The objection now made in the case before us was not argued or suggested in *Cooper v. Slade*; and, therefore, that case is not an authority as a decision on the question; but it shows that this point did not occur to the Counsel for the defendant, or to the Judge at the trial; and it was not noticed either in the discussion in the House of Lords, or in the previous discussion before the Court of Error, reported in 6 *Ell. & Black.*, p. 447.

The second objection was, that I ought to have told the jury that the plaintiff and his son (the son being privy to the alleged promise to the father, and to the father's acquiescence) were accomplices in an indictable offence, and ought not to be believed without corroboration. In the present case, there plainly were circumstances of corroboration; but, as to this objection, it is unnecessary to say more than that the very point was ruled by the Court of Common Pleas, in *McClory v. Wright (a)*. I shall only add that I not only defer to that decision as an authority, but entirely concur in the judgment.

The third objection to the charge was that which was chiefly argued before us. The defendant's Counsel called on me to tell the jury that, this being a case in which the defendant was accused of a crime, if they entertained a reasonable doubt of his guilt, they ought to give the benefit of that doubt to the defendant, and to find a verdict for him. I have already stated what, on this subject, I told the jury.

Two questions here arise; First, whether, regard being had to the entire direction, it was wrong to tell them that I would not advise them to find a verdict for either party upon a doubt, and not to tell them to give the benefit of a reasonable doubt to the defendant, and find for him if they entertained it? Secondly, whether, regard being had to the direction which *was* given, and to the finding of the jury, the defendant can have been prejudiced

(a) 10 Ir. Com. Law Rep. 514.

by the direction which resulted in that finding? I answer both questions in the negative. As to the first; when the *onus probandi*, in reference to any issue, lies upon a party, the rule is, and it is a rule of necessity (for otherwise a mere allegation unproved would involve perpetual suspension of judgment), that if no evidence be given for the affirmative, the jury ought to find in the negative; *De non apparentibus et non existentibus eadem est ratio*. But when evidence is given at both sides, the jury, I apprehend, ought, upon that evidence, to decide between the parties. They are bound by their oaths to give a true verdict according to the evidence. They cannot give a true verdict according to the evidence if they believe, upon the evidence, the contrary of what they find. It is in the very nature of a vast number, and of probably the majority, of disputed questions of fact in civil controversies, that to whatever side the tribunal inclines, it determines with some mixture, more or less, of doubt in its judgment. But a firm mind ought neither, on the one hand, to forbear from deciding by reason of a doubt, nor, on the other, to decide in favour of him who alleges a negative, because it entertains a doubt in the course of its deliberations. If, on a view of the preponderance of testimony, the tribunal be satisfied that the fact alleged existed, or that it did not exist, it is its duty so to declare. The law of evidence is unquestionably the same in criminal and in civil cases; but in criminal cases, Judges, in favour of life and liberty (one or the other of which is involved in every criminal prosecution), are in the habit of advising a stricter view to be taken of the evidence than in civil trials; and, accordingly, in favour of the presumption of innocence, with which the law invests every person accused of a crime, until he is proved to be guilty, and for the protection of a party who cannot be heard in his own defence, and in order to provide all reasonable safeguards against erroneous convictions, which, in some cases, may be followed by irrevocable sentences, Judges have been in the habit of advising juries to acquit the accused if they have a reasonable doubt of guilt. The nature and grounds of this practice are well expressed in Mr. *Best's Principles of the Law of Evidence*, p. 120. After stating that the rule of evidence is, in general, the same in civil and crimi-

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nal proceedings, he adds:—"But there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is sufficient basis of decision; but in the latter, especially where the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation, both to the accused and to society, the immeasurably greater evils which flow from it than from an erroneous acquittal have induced the laws of every wise and civilized nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty; or, as an eminent Judge, still living, expressed it, 'such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt:'" citing *Parke, B., in Regins v. Sterne* (Surrey Summer Assizes 1843), M.S. See also *Greenleaf on Evidence*, s. 13. In the case of *Cooper v. Slade* (a), this subject is noticed by Mr. Justice Willes in his judgment. That eminent Judge referred, with approbation, to the passage which I have quoted from Mr. *Best's* book, citing the then last edition of the work. Mr. Justice Willes was dealing with the question which arose in an action precisely similar to the action now before us, brought upon the same section of the same Act of Parliament. The main question of fact was, whether there was any evidence at all to go to the jury, in support of the allegation that the defendant had authorised the writing of a certain letter, received by the voter, soliciting his vote, and apprising him that his "Railway expenses would be paid." The question must have been a doubtful one; for the Court of Exchequer Chamber, with one dissentient Judge, Mr. Justice Williams, held that there was not evidence to go to the jury; and of the eight Judges who delivered their opinions to the House of Lords, three agreed with the majority of the Court of Exchequer Chamber, in thinking that there was no evidence to go to the jury in support of the allegation, and five concurred with the dissentient Judge below, in thinking that there was. The

(a) 6 H. of L. Cas. 772.

House of Lords concurred with the five Judges whose opinions were delivered in that house, and with the dissentient Judge in the Court of Exchequer Chamber, and accordingly reversed the decision of that Court. The question (the second of those put by the House of Lords to the Judges) was, "whether there was any evidence for the jury that the letter in question was written or sent by the authority of the defendant in error?" Mr. J. Willes said, p. 772, "That the defendant authorised Reed to communicate to the voters in some form, 'in order to bring them up,' that their Railway expenses would be paid, in some sense, is certain. It was improbable, under the circumstances, that the candidate should intend to pay the expenses of persons who voted against him, or not at all; and at least, therefore, it was for the jurors to say whether, in their judgment, the more probable and rational view of the case, and that acted upon by the defendant's agent in the matter, was not the true one, namely, that the candidate intended the out-voters to be informed that they would be paid their Railway expenses conditionally, if they voted on his side. As a difference of opinion exists upon this question, I may be excused for referring to an authority in support of the elementary proposition that, in civil cases, the preponderance of probability may constitute a sufficient ground for a verdict. I find such an authority referred to in Mr. *Best's* very able and instructive treatise on the *Principles of Evidence*. So long since as the 14th of *Eliz.*, Chief Justice Dyer, and a majority of the other Justices of the Common Pleas, laid down this distinction between pleadings and evidence: "that in a writ or declaration, or other pleading, certainty ought to be shown, for there the party must answer to it, and the Court must adjudge upon it; and that which the party shall be compelled to answer to, and which is the foundation whereupon the Court is to give judgment, ought to be certain, or else the party would be driven to answer to what he does not know, and the Court to give judgment upon that which is utterly uncertain. But where the matter is so far gone that the parties are at issue, or that the inquest is awarded by default, so that the jury is to give a verdict one way or the other; then, if the matter

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“ ‘is doubtful, they may found their verdict upon that which
“ ‘appears the most probable, and, by the same reason, that which
“ ‘is most probable shall be good evidence :’ ” *Newis v. Lark* (a).
Mr. Justice Willes plainly treats such an action as the present as one
which is to be regarded as a civil proceeding. The same view
appears to have been taken of this form of action in the Court
of Common Pleas in Ireland, in the case of *M'Clory v. Wright* (b),
though the precise question which I am now discussing was not
raised for decision there. An action for penalties is so treated in
2 Taylor on Evidence, p. 1027, s. 1224 ; and such appears to have
been the opinions of Barons Martin and Platt, in *The Attorney-
General v. Radloff* (c), and also of Baron Parke, pp. 106, 107,
though he held differently in reference to an information, not for
debt, but for penalties forfeited for an offence against the Revenue
Laws. The case of *Thurtell v. Beaumont* (d) was relied on strongly
by the defendant's Counsel in argument before us. That was an
action of assumpsit on a policy of insurance against loss or damage
by fire, to recover the value of certain goods insured by the plaintiff,
and destroyed by fire. The plea was the general issue, which,
of course, opened (according to the rules of pleadings and practice
then prevailing) the defence on which the main controversy arose.
That defence was, that the plaintiff had wilfully set fire to the pre-
mises in which the goods were, or had caused them to be set on
fire by some other person. The learned Judge, at the trial, told
the jury, “ That in order to substantiate the defence of the premises
“ having been set on fire, the same evidence ought to be adduced
“ as if the plaintiff had been indicted for arson ; and that it was
“ their duty to be satisfied that the crime imputed to him was
“ as fully substantiated in this action as would warrant their
“ finding him guilty of the capital offence, in case he had been
“ brought before them and tried on an indictment on a criminal
“ charge.” The jury found for the plaintiff. In applying for a
new trial, on the ground of misdirection, the defendant's Counsel
submitted, “ That the learned Judge had laid it down too broadly,

(a) Plowd. 412.

(b) 10 Ir. Com. Law Rep. 514.

(c) 10 Exch. 84.

(d) 8 B. Moo. 612.

"to the jury, in stating that they should entertain the same
 "certainty with respect to the plaintiff's guilt as would justify
 "them in convicting him on a criminal charge; for that, in
 "a civil action of this description, it was fully competent to the
 "jury to decide on the balance of probabilities given in evi-
 "dence, as in any other case where they would be warranted in
 "finding against the plaintiff, if he failed to make out his claim to
 "their satisfaction, *although arson might not have been proved*; for
 "if the loss had been occasioned by the gross negligence of the plain-
 "tiff, or his servants, *unaccompanied with guilt*, the defendant
 "would have been entitled to a verdict." It is plain, from the
 argument, that the point raised for the opinion of the Court was,
 not whether the learned Judge had properly told the jury to give
 the benefit of a doubt to the plaintiff (of which there is no statement
 whatever in the report of what passed at the trial, or in the report
 of the argument on the new trial motion); but whether, in order to
 establish the defence, the defendant should show, to the satisfaction
 of the jury, that the crime of arson had been committed. The de-
 fendant's Counsel contended, that proof falling short of that, and
 establishing gross negligence without guilt, was a sufficient answer
 to the action. The Court decided otherwise. The Court held "That
 "the directions of the learned Judge to the jury were perfectly cor-
 "rect; *as* the question for their consideration was, whether the
 "plaintiff had set fire to his premises or not? and the defendant
 "relied on the fact of his having wilfully or *intentionally* done so;
 "which, in point of principle, embraced *the same question* as if he
 "had been put on his trial on the charge of arson." The point on
 which the Court were called upon to decide, and which they in re-
 sult decided, was, not as to the form or language in which the
 learned Judge at the trial advised or directed the jury, but as to the
 substance of the question which he left to the jury. The defendant's
 Counsel contended that it was enough to prove gross negligence,
 and that it was not necessary to prove a wilful setting on fire of the
 premises, which would amount to the guilt of arson. The Court, in
 effect, decided that, in the particular case before them, it was essen-
 tial to establish a wilful and intentional setting of the premises on

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fire; and that this was only another way of stating that the plaintiff had been guilty of arson. I may observe, first, that in *Thurtell v. Beaumont*, the learned Judge did not direct the jury that they ought to give the benefit of a doubt to the plaintiff in that action. Secondly; that in the case now before us, the jury were told, as the jury were in effect told in *Thurtell v. Beaumont*, in reference to what was there alleged, that, in order to find for the party alleging the promise charged, they must be *satisfied* that the promise was substantiated by the evidence.

It has been argued that the jury ought to have been told to give the benefit of a doubt to the defendant, because, until all doubt shall have been removed, the presumption of innocence stands unrebutted. But this argument begs the question; for it assumes that the presumption, in a civil case, cannot be rebutted while a doubt remains. To lay down that as a general proposition would be, I believe, to affirm a doctrine perfectly new, and calculated to create the greatest difficulty and embarrassment in trial by jury. No case has been cited in which it was ever held that a Judge, in a civil case, ought, as matter of direction to a jury, to tell them they ought to give the benefit of a doubt to either party; and I am not aware of any instance in which, in a civil case, it has been so decided, except in the case of alleged adulterine bastardy. There the rule of law, resting on special grounds, is, that where any opportunity exists of access in wedlock, the presumption must prevail that access has taken place, unless the tribunal before which the question arises is satisfied, without any reasonable doubt, that it has not. This was so laid down in several stages of *Morris v. Davies*, and, finally, in the House of Lords (a), recognising the resolutions of the Judges in *The Banbury Peerage case*, which are stated in *Nicholas on Adulterine Bastardy*, p. 181, and in the note to *Head v. Head* (b); and see *Legge v. Edmonds* (c). In other civil cases, Judges have left, for the consideration of juries, questions as to imputed crime and misconduct, in language very various, according to the views which they took of the questions, and of the evidence applicable to

(a) 5 Cl. & Fin. 163.

(b) 1 Sim. & St. 150.

(c) 25 L. J., N. S., Chan., 125.

them. The course generally adopted in practice by the Judge, within my memory, has been, where the affirmative of the issue lay on either party, or where either party has sought to displace an existing right, or to rebut a presumption authorised by law, to direct the jury that, before they find in the affirmative of the issue, or before they displace the right, or before they find against the presumption, they ought to be satisfied, upon the evidence, that the state of facts existed on which the party seeking any of those results relied.* The jury, although they may consider the case a doubtful one, may, upon weighing the evidence, and finding their minds sufficiently influenced by the preponderance of it at one side, *be satisfied of the fact*, by that preponderance. If they are, they ought to find in the affirmative of the allegation. If, on due deliberation, they are not so satisfied, the burthen of proof is not sustained, and they ought to find in the negative. But to lay it down as a rule for the government of juries, that they must have positive certainty to warrant their finding for one party, but that they may find, on a reasonable doubt, for the other, would, in a vast number of cases, involve an absolute perversion of justice. If such a rule ought to be applied, generally, to judicial inquiries, a large proportion, not only of verdicts hitherto given, but of the most solemn and best considered

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* NOTE.—The terms in which Judges have left the question to juries, in cases analogous to those mentioned in the judgment, have been very various. On examining a large number of reported directions, it will, it is believed, be found, that they are in substantial conformity with what is here stated. See *Chalmers v. Shackell* (6 Car. & P. 475, 478-9), and *Cotterill v. Starkey* (8 Car. & P. 691, 695), cited by defendant's Counsel in the argument. See also *Hughes v. Marshall* (2 Crompt. & Jer. 118); *Dover v. Maestaer* (5 Espin. 93); *Neeley v. Lock* (8 Car. & P. 527, 532-3); *Webb v. Smith* (6 Scott, 151-2); *Thomas v. Edwards* (2 M. & W. 216); *Heuston v. Faucett* (Har. & Wool. 125). And see the summing up of Lord Tentarden in *Cooper v. Wakly* (3 C. & P. 179), and *Andrews v. Chapman* (3 C. & K. 289). See also the following: *Rus. & Ry.* 239, 312, 313, 415, 181, 377; 2 M. & R. 63; 1 Car. & P. 476; 2 Car. & P. 310, 348, 155-6-7; 3 Car. & P. 158-9, 143, 266, 479-80; 4 Car. & P. 306-7, 356, 490; 5 Car. & P. 58, 195, 548; 6 Car. & P. 248; 7 Car. & P. 397, 689, 738-39-40; 8 Car. & P. 91, 469; 9 Car. & P. 587; 1 Car. & K. 328; 2 Car. & K. 586, 647, 677; 1 Fos. & Fin. 473-4; 2 Fos. & F. 180; 4 Car. & P. 508; 13 M. & W. 658, 663, 665. The case of *Neeley v. Lock* (8 Car. & P. 527, 532-3) seems the only one in which a doubt is mentioned as the ground on which the jury were to act in considering their verdict.

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decisions of Courts of Equity, determining on facts as well as on law, but determining after hesitation and not without doubt (not to speak of the determinations in tribunals having summary jurisdictions, and in the Courts of Appeal from their judgments and decrees), ought, in deference to these doubts, to have been the other way. If the proposition contended for by the defendant be law, the question involved in it must have arisen in a multitude of cases. Numerous presumptions exist, and are presented continually for consideration in Courts of Justice, on which the question must arise as directly as upon the presumption of innocence, which is relied on in the case before us. The continuance of life is presumed (within the ordinary limits of longevity), until that presumption is rebutted by proof of death, or by the contrary presumption supplied by the statute relating to the *cestui que vies* in a lease; and this last presumption again must prevail, unless answered by the proof which the statute requires. The presumption is against fraud, and against illegality in a contract, and in favour of obedience to the law. That presumption applies (until some evidence be given to rebut it) in every case of alleged fraud or illegality in the making of a bill of exchange, or of any other contract. In some cases the very same act is a criminal offence, and may also be the subject of an action of damages. In almost every issue under an interpleader order, in every case in which a bill of exchange is impeached for fraud, or for illegality, as when it is alleged to have been given in contravention of the policy of the Insolvent and Bankrupt Laws, in every case of assault and libel—a presumption of this kind arises. No case has been cited in which, where any of those questions of presumption was involved, it was held that such a direction ought to be given as was sought in the case now before us. In *Sutton v. Sadlier* (a), the plaintiff in ejectment, claiming as heir-at-law, was resisted by the defendant, who relied upon a will of the person last seized. The defendant admitted that the plaintiff was heir-at-law, proved the execution of the will, and rested his case on that evidence. Evidence was then given by the plaintiff, tending to impeach the competency of the testator to make a will. The learned Judge told the

(a) 3 Com. B., N. S., 87.

jury that the heir-at-law was entitled to recover unless a will was proved; but that when a will was produced, and the execution of it proved, the law presumed sanity, and, therefore, the burthen of proof was shifted; and that the devisee must prevail, unless the heir-at-law established the incompetency of the testator; and that if the evidence was such as to leave it a measuring cast, *and leave them in doubt*, they ought to find for the defendant. The Court held this a misdirection, and set aside a verdict obtained by the defendant, being of opinion that the defendant was bound to prove the capacity of the testator to make the will. It was strongly urged in argument, that the presumption of sanity ought to stand until rebutted by proof. Cresswell, J., in giving judgment, said (p. 96): "The presumption of sanity cannot, we think, be treated as a merely artificial or legal presumption, but, at the utmost; as a presumption of law and fact; that is, an inference to be made by a jury, from the absence of evidence to show that a party does not enjoy that soundness which experience proves to be the general condition of the human mind. But, in such cases, when evidence is laid before a jury, they must decide according to what they believe to be the truth; and, where a will is set up as a valid will, a jury ought not to pronounce it to be so, unless they are convinced of the affirmative." To all cases of disputable presumption, the maxim applies, "*Stabit presumptio donec probetur in contrarium.*" But when the contrary proof *has* been given, whether direct or circumstantial, whether by witnesses concurring in their testimony, or by a preponderance in evidence, involving a multitude of intricate facts, it is the business of the tribunal to deal with the evidence, and to form, if it can, a judgment, upon the evidence, in the affirmative or negative of the question in controversy. If a jury were, in every such case, directed to yield to a doubt, such direction would be an authoritative encouragement to them not to undertake, but to avoid, the labour of inquiry and the duty of weighing the evidence, and determining on which side the truth lies. Such an instruction would have a direct tendency to induce them, in a case of difficulty, on retiring into their jury-room, to consider, not which party was right, but whether the case was one of doubt; and on finding that

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it was, at once and without further trouble, and *on that doubt*, found their verdict. In a large proportion of the controversies which arise out of the complex relations of social and commercial life, a tribunal, regulating itself by such a rule, not only would be often useless for the purposes of justice, but would be, not unfrequently, an instrument of injustice and of wrong. It would give to the craft of a designing party, or to the ingenuity of an adroit and powerful advocate, the means of obstructing many just demands and many righteous defences, by raising doubts, from which whether the result of design or of accident, few complicated transactions are wholly free.

For these reasons, I am of opinion that I ought not on this point to have directed the jury as required, and that this ground of objection for misdirection cannot be sustained. Secondly; but even if the omission to tell the jury that they ought to give the benefit of a doubt to the defendant was wrong, I am very clearly of opinion that it is utterly impossible to sustain the conditional order to set aside the verdict on that ground. My reasons for this opinion may be stated in a few words. The jury were told that I would not advise them to give a verdict for either party *upon a doubt*; but this was coupled with a positive *direction* that "they ought *not* to find for the *plaintiff*, unless, on "the evidence, they believed, *and were satisfied of the fact*, that "the alleged promise was made." It is impossible to treat their finding as anything else than a finding on the ground that the jury, on the evidence, believed, *and were satisfied of the fact*, that the alleged promise was made. If (as was urged in argument by the defendant's Counsel) the withholding of the advice which I was called upon to give to the jury, and the intimation that I would not advise them to find a verdict for either party upon a doubt, were capable of being understood by the jury, and were in fact understood by them, as a *direction* that they were *not at liberty* to find a verdict for either party upon a doubt, still the same reason, which I have last stated, would apply with at least equal force to their finding; for, if they acted under the belief that they were not at liberty to find for either party

upon a doubt, then, although the defendant might (if his argument be right) have been entitled to complain, if there had been no verdict, he cannot have been prejudiced by there having been a verdict *against him*, since it was given under the government of that direction, and could only have been given because the jury entertained no doubt that the promise had been made. In other words, whether they acted in the absence of the advice which was withheld, or under the supposition that the withholding of the advice was tantamount to a direction that they were not at liberty to find a verdict for either party upon a doubt, their finding for the plaintiff was equivalent to a declaration that they were satisfied, upon the evidence (and, if they acted on a direction, were satisfied without a doubt), that the alleged promise was made. If authority were wanted for a proposition so plain as that, when it appears that the jury find what sustains the verdict upon a part of a direction which is right, their verdict will not be set aside, even if there be a misdirection on another point collateral and immaterial, such authority will be found in the cases of *Twigg v. Potts* (a); *Vacher v. Cocks* (b); *Clarke v. Arden* (c); and *Nepean v. Doe d. Knight* (d). This is not the case of an alternative direction and a general verdict, as to which it would be uncertain on which branch of the alternative the jury found. Here the jury could not, under the direction, have found for the plaintiff, unless they were satisfied, upon the evidence, that the promise was made, the making of which entitled the plaintiff to a verdict. I am, therefore, willing to rest my judgment upon the ground which I have last mentioned; and I should prefer doing so, as it is, upon the construction of what I told the jury, 'most favourable (according to the argument of his Counsel, as I understood it) to the defendant.

I have treated the case as if the subject-matter of the third objection were matter of direction, and not merely matter of advice, like that which is given in criminal cases, in reference to the

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(a) 1 Cr., M. & B. 89; S. C., 3 Tyrw. 969.

(b) 1 B. & Ad. 145.

(c) 1 Jur., N. S., 710.

(d) 2 M. & W. 894; see Lord Denman's judgment, p. 912.

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corroboration of accomplices. But even if it be not in strictness proper matter of exception as for a misdirection, still if the jury were misadvised, and the misadvice influenced their verdict, I should not, on a new trial motion, uphold a verdict so obtained.

My Brother HUGHES, who is unable to attend to-day, authorises me to say that he concurs in my opinion, that the verdict ought not to be disturbed, and that the cause shown against the conditional order ought to be allowed.

FITZGERALD, B.

In this case, I am of opinion that there ought to be a new trial, on the ground of misdirection. The action was founded on the 17 & 18 Vic., c. 102, and the substantial question was, whether the defendant had committed bribery, within the definition of that Act? A person so offending is, by the terms of the Act, guilty of a misdemeanour, and also liable to forfeit the sum of £100 to any person who shall sue for the same, with full costs of suit; and the further effect, either of a conviction or judgment against the defendant, in an action for the penalty, is to deprive him of the elective franchise, if he has a vote, or to prevent him from obtaining it, if he has not. At the trial, the Counsel for the defendant, in his address to the jury, strongly insisted that, before they could find against the defendant, they must be satisfied that he was guilty of the offence charged, with the same certainty as if he was on trial before them on an indictment for that offence, and that he was entitled to the benefit of any doubt which the evidence might leave on their minds. I am of opinion that the defendant's Counsel was well warranted in this contention. The cases cited in the argument upon the part of the defendant, and particularly that of *Thurtell v. Beaumont* (a), appear to me to be in point. I have heard no authority to the contrary. It seems to me that the same presumption of innocence which makes imperative the certainty of proof of crime in criminal trials is recognised in civil cases, and is attended with the same effects; in fact it is common learning, that it shifts the *onus* of proof, and, even in

(a) 1 Bing. 340.

civil cases, throws the burden of proving a negative on the party alleging criminal default. In this case, after or during the charge of my LORD CHIEF BARON, it appears that the jury, or some of them, asked him whether they were to deal with the case as a criminal one, by finding for the defendant on a doubt? to which the learned Judge answered that they were not, to the extent of finding on a doubt for either party. With deference, that appears to me to be a misdirection. As an answer to the question of the jury, it tells them that they were not to give the defendant the benefit of a doubt, as they ought to do in a criminal case; and, taking in the other part of the direction, that they were not to find for the plaintiff on a doubt, it amounts to this, that, in a case of doubt, they were to find no verdict. That appears to me also a misdirection. In my opinion, it never can be the duty of a juror to find no verdict. Consistently with the duty of the jurors, there may be no verdict; but that can only be where the states of their respective minds are such that it is the duty of one or more to find one way, and of the rest to find otherwise. It is then, however, said, that the misdirection had no effect, because the jurors here found for the plaintiff, which they would not do, consistently with the direction, if they had a doubt; that, therefore, the defendant has been in no way injured by the misdirection, if it be such; and that, consequently, there ought not to be a new trial. But this is a speculation in which I cannot allow myself to indulge. If it were clear that the jury had wholly disregarded the direction of the Judge, and had acted contrary to it, I can understand that the incorrectness of the direction might not of itself constitute a ground for a new trial. It is plain that the main object of the jury was to know whether the acknowledged rule in criminal cases was to be applied for the benefit of the *defendant*. They were, in my opinion, erroneously told that it was neither. I cannot find any effectual means of ascertaining how far the misapprehension thus induced in their minds was corrected by a qualification which made the whole direction still erroneous, and left them no course, if they felt a doubt, but finding for the plaintiff, or finding no verdict at all. I do not object to

H. T. 1861.

Exchequer.

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H. T. 1861. the charge as not directing the jury to give the defendant the benefit of a doubt, but for expressly telling them they were not.
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On these grounds, I am of opinion that the conditional order ought to be made absolute, and a new trial had.

PIGOT, C. B.

As to what was mentioned at the Bar, and in the Counsel's certificate, of a question put to me by one of the jury, I have no note of it. It is not my habit to take down what passes in inquiry and explanation between the Court and the jury. I am on the rule applied in *Napier v. Daniel* (a), that it is not by interlocutory observations of that nature, but by the final directions of the Judge, and the finding of the jury, that the propriety of the direction, and of the verdict, is to be judged. My recollection is, that a question was asked by a juror, whether they were to act upon what had been very strongly urged by the defendant's Counsel, in reference to the giving of the benefit of a doubt to the defendant? I do not remember the precise stage of the proceedings in which that occurred. Whenever it occurred, it was followed by my instructions to the jury, which I have already stated from my notes. They were a very intelligent jury; and I have no doubt that they fully understood what they were told.

(a) 3 Bing., N. C., 77.

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(*Common Pleas.*)

May 31.
 June 12.

THIS was an ejectment on the title, to recover twelve acres of the lands of Carrane, held by the defendant under a lease dated the 1st of August 1832. The action was tried at the Mayo Spring Assizes 1860, before Hayes, J.; when it appeared that the lease in question had been made between John and Hubert Trench of the one part, and Laurence Goggins of the other part; whereby the lessors granted and demised the lands of Carrane unto the said Laurence Goggins; *habendum* to him, his heirs, executors, administrators and assigns, from the 1st of November next ensuing the date of the lease, for and during the term of twenty-seven years, from the 1st of November next ensuing, and for and during the natural life of Patrick Fleming of Knocktubber, whichever should last longest, at the rent of £14. 7s. 6d. Then followed the usual clauses of distress and re-entry, and covenant by the lessee for payment of rent and keeping the premises in repair. Then followed this special clause:—
 “And it is further agreed on, by and between both parties, that
 “the aforesaid John Trench and Hubert Trench are to give

Lands were demised to L. G., *habendum* to him, his heirs, &c., from the 1st of November ensuing, for the term of twenty-seven years, and the life of P. F. of K., whichever should last longest, at the rent of £14. 7s. 6d. The lease contained a covenant that L. G. should keep possession and enjoy the aforesaid lands and premises at the yearly rent so long, after the space of twenty-seven years, as his money, or any part thereof, remains

due to L. G.; and a further covenant that, whereas the lessors were further indebted to L. G. in certain bond debts, amounting to £275, bearing interest, that they would pass receipts every half year or yearly, to L. G., for the rent of the premises, by reason of the interest being more than the rent, by the sum of £2. 2s. 6d., and to have no recourse to L. G. or his heirs, for distress, or any other claiming from or under them; and are to have no power to drive said L. G. while said moneys remained due, but to pass receipts mutually by both parties, and leave a balance of £2. 2s. 6d. due to the said L. G.; and the lessors bound themselves, under a penalty of £100, to observe this latter covenant. It appeared that there were two persons, named P. F. of Knockatubber, father and son, at the time of making the lease. The elder P. F. died, and the term of twenty-seven years having expired, but before the debt of £275 was paid off, an ejectment was brought by the representatives of the lessor against the representatives of the lessee, to recover possession of the premises.—*Held* that, in the absence of positive evidence to show which of the P. F.'s was intended as the *cestui que vie*, the presumption of law was in favour of the elder of the two lives being the one contemplated by the parties.

Held also, that the covenant in the lease did not operate so as to create a freehold estate, or one for any certain term of years.

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“turbary, in the bog of Carrane, unto the said Laurence Goggins;
 “his heirs and assigns; with liberty to pass and re-pass across and
 “egress and regress through same, and to graze on said avenue
 “as far as his holding extends in Carrane; and the aforesaid
 “Laurence Goggins is to keep possession and enjoy the aforesaid
 “lands and premises at the yearly rent, so long (after the space of
 “twenty-seven years) as his money, or any part thereof, remains
 “due to the said Laurence Goggins. It is also agreed upon, that
 “the aforesaid Laurence Goggins is at liberty to burn said lands
 “and premises during his tenure thereof.” Then followed the
 usual covenant for quiet enjoyment, and the deed then proceeded
 thus:—“And whereas the aforesaid John Trench and Hubert
 “Trench are jointly indebted unto the aforesaid Laurence Goggins
 “in the principal sum of £150, per their bond and warrant, upon
 “which bond there is judgment entered, and also another bond of
 “£125 sterling, both together making the sum of £275, the interest
 “of which sum is £16. 10s: now the aforesaid John Trench and
 “Hubert Trench do bind themselves, their heirs, executors, admin-
 “istrators and assigns, to pass their receipts every half year or
 “yearly, unto the said Laurence Goggins, for the rent of said
 “premises, by reason of the interest being more than the rent
 “by the sum of £2. 2s. 6d., and to have no recourse whatever unto
 “the aforesaid Laurence Goggins or his heirs, for distress, or any
 “other person claiming from or under them or any of them, and
 “are to have no power or liberty to drive him said Laurence
 “Goggins, while said money remains due, but to pass receipts mutu-
 “ally by both parties, and leave a balance of £2. 2s. 6d. due to the
 “said Laurence Goggins: now, also, the said John Trench and
 “Hubert Trench do bind themselves, under the penalty of £100
 “sterling, to him the said Laurence Goggins, not to be molested
 “or driven by them or any of them, or any person claiming from
 “or under them.” A witness of the name of Roach proved
 the execution of the lease; and, on cross-examination, stated that
 he knew Patrick Fleming; he died about six years ago; he was
 an old man when the lease was made. The witness also stated that
 he knew his son Patrick Fleming, who was then alive, and was
 about sixty years old. The father and his two sons, Patrick and

James, lived in Knockatubber when the lease was made, and both were known to the Trenchs. The two sons lived next door to each other; the father lived sometimes with the one and sometimes with the other. Patrick Fleming junior was the eldest; he got a house and ten acres from his father; James had got the like. The father retained neither house nor lands. On re-examination, the witness stated that, before and at the time of the execution of the lease, they were talking of the life of Patrick Fleming, the old man, and Hubert Trench said it was the old man who was the life in the lease. Laurence Goggins did not expect or require that the life of the young man should be first put in; the old man was then seventy; the young man forty, or less. The old man was then living between his two sons. The witness also stated that all the persons who were present at the execution of the lease were dead, except himself. In a conversation with the defendant, the witness said it was the old man, he replied it was the young man, whose life was in the lease. Another witness was called to prove the devolution of the title, and admitted on cross-examination that the principal sum of £275 still remained unpaid. No witnesses were examined for the defendant.

Counsel for the plaintiff then called on his Lordship to tell the jury that there was no evidence that the life of Patrick Fleming junior was the life intended, and that they should find for the plaintiff, Patrick Fleming senior having been proved to be dead. The learned Judge declined so to do, but left it to the jury to say, under all the circumstances, whether it was the life of Patrick Fleming senior or junior that was mentioned in the lease; telling them that, when a father and son were of the same name, and no distinguishing affix used, the presumption was, that the father was meant, but that this was capable of being rebutted. He also left it to them to say whether the £275 mentioned in the lease as being due by the lessor to the lessees had been paid or not. The jury found that Patrick Fleming junior was the life in the lease, and that the money had not been paid; and a verdict was accordingly entered for the defendant. A conditional order was subsequently obtained to set aside the verdict, upon the ground, amongst others, of the misdirection of the learned Judge.

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Walter Bourke and Malley, in support of the conditional order.

The legal presumption is in favour of the life of the father being intended to be the *cestui que vie* in the lease. There was positive evidence given by the attesting witness, that such was the case which evidence was not contradicted. The suffix "younger" raises the presumption that the elder was meant. Secondly; the covenant in the lease created no legal estate; nor can it operate by way of enlargement: 2 *Shep. Touch.*, by *Preston*, p. 272; "And, therefore, 'if A bargain and sell his land to B, on condition to re-enter, if he 'pay him £100, and B doth covenant with A that he will not take the profits until default of payment, or that A shall take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease, for want of a more formal contract, and also for want of certainty of term.' The lease is void; as a freehold lease, as it grants a freehold *in futuro*. There are no words of limitation in the premises: *Goodtitle v. Gibbs* (a); *Baldwin's case* (b); *Hope v. Booth* (c).

Concannon and Carleton, on behalf of the defendant, in support of the verdict.

The jury was not bound to believe the parol evidence regarding the intention of the parties at the time of granting the lease. The presumption of law is in favour of the life of the younger man being that intended, as being less favourable to the grantor. The lease is perfectly valid. It is for a life *in presenti*, with a concurrent term of twenty-seven years from the 1st of November 1832; and the covenant has the effect of a *habendum*, so as to create a legal estate in the grantee, which was to last until the money was paid. The words "have and enjoy," in a covenant, have been held to give a legal estate: *Drake v. Munday* (d), cited in *Doe v. Ashburner* (e); *Kerr v. Kerr* (f). No objection was made at the trial to the validity of the lease, as granting a future freehold interest.

Cur. ad. vult.

(a) 5 B. & C. 709.

(c) 1 B. & Ad. 709.

(e) 5 T. R. 163.

(b) 2 Rep. 18.

(d) Cro. Car. 307.

(f) 4 Ir. Chan. Rep. 433.

MONAHAN, C. J.

This was an ejectment on the title, tried before Judge Hayes, at the last Assizes for the county of Mayo. It appears, from the report of the learned Judge, that plaintiff, at the trial, examined as a witness Patrick Roach, who proved that he was present at the execution of a lease of the 1st of August 1832, which was produced at the trial, by which John and Hubert Trench demised to Laurence Goggins the premises in question, containing about twelve acres of the lands of Carrane, from the 1st of November then next, at the rent of £14. 7s. 6d. per year, for a term of twenty-seven years, or the life of Patrick Fleming, of Knockatubber, whichever should last longest. There was also a statement in the lease that the Messrs. Trench, the lessors, owed the lessee, Goggins, a sum of £275, secured by bond; and it was stated in the lease that it was agreed between the parties that Goggins, the lessee, should be at liberty to retain the reserved rent in part payment of the interest which should accrue on the bond; and there was also a clause that the said Laurence Goggins was to keep possession, and enjoy the aforesaid lands and premises, at the same yearly rent, so long after the space of twenty-seven years as his money, or any part thereof, remains due to the said Laurence Goggins. There was no provision as to how the residue of the interest, or the principal money, was to be paid. Roach, who proved the execution of the lease, also proved that, at the time of its execution, there were two Patrick Flemings living in Knockatubber, father and son; that the father was an old man at the time; that he had been originally the lessee or tenant of the farm of Knockatubber, but had divided it between his two sons, Patrick and James; that each son had a house and about half the farm, the houses being quite close one to the other; that the eldest son, Patrick, was about forty years of age at the time of the execution of the lease, and is still living; that Patrick Fleming the elder was dead about six years; that, at the time of the execution of the lease, and for some years previously, the old man had no house of his own, but continued to live with his sons at Knockatubber, sometimes with one son, and sometimes with the other.

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Witness also stated that, at the time of the execution of the lease. Mr. Trench, one of the lessors, stated to Goggins, the lessee, that old Patrick Fleming was the life he was giving of the lands, to which Goggins, the lessee, assented. The witness, on his cross-examination, stated that, at the time of the execution of the lease, old Patrick Fleming was about seventy years of age, young Patrick about forty; that the old man was infirm, and certainly not likely to live twenty-seven years. He was further cross-examined as to his credit, and the improbability of the tenant selecting the old man as the *cestui que vie*, if he had any choice in the matter. Plaintiff also proved that he was the heir-at-law of the lessors in the lease. It also appeared, that no part of the principal money due at the time of the execution of the lease had since been paid. It appeared that the lessors, Hubert and John Trench, were father and son, that both are several years dead, and that John was the eldest son of his father, Hubert, and the present plaintiff the eldest son of John, the lessor; it was also proved that old Patrick Fleming had been a servant in the family for many years, and through several generations, but that both the Flemings, father and son, were well known to the family. Plaintiff proved a demand of possession from the defendant, on the 2nd of November 1859, the twenty-seven years having expired on the previous day. Roach further stated, that all persons present at the execution of the lease, except himself, were dead. This was the entire of the evidence, the defendant not having gone into any.

At the close of the case, plaintiff's Counsel submitted that the legal presumption was, that Patrick Fleming the elder was the *cestui que vie*; and there being no evidence to rebut the presumption, he called on the Judge to direct a verdict for the plaintiff; and this, as I understand, altogether independent of Roach's evidence, as, of course, if the jury believed his evidence, no question could exist in the case. I collect from the Judge's report, though it is not expressly stated, that defendant's Counsel insisted that it was for the jury to determine what life was intended by the parties; and also that the money mentioned in the lease being still due, defendant, who claimed under the lessee, was entitled to retain the possession.

The learned Judge reports that he declined directing a verdict for the plaintiff, as required, but that he left it to the jury to say, under all the circumstances, whether it was the life of Patrick Fleming senior or junior that was *meant* in the lease. The learned Judge further reports, that he told the jury that, where father and son were of the same name, and no distinguishing affix was used, the presumption was that the father was meant; but that this was capable of being rebutted. He also reports that he left it to them to say whether the £275, mentioned in the lease as having been due by the lessor to the lessee, was paid or not. The jury found that Patrick Fleming junior was the life in the lease, and that the money had not been paid; and, therefore, the learned Judge directed a verdict for the defendant, to set aside which plaintiff has obtained a conditional order, on the ground of misdirection of the learned Judge, in not directing a verdict for plaintiff, as required by his Counsel.

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The case has been argued at considerable length, plaintiff's Counsel insisting, as he did at the trial, that there was no evidence to rebut the presumption of the father being the *cestui que vie*; and also, that the proviso as to the continuance in possession, so long as any part of the money should remain due, did not confer any legal estate; and he also suggested that the lease of August 1832 could not have passed an estate for the lives of either of the Patrick Flemings, it being to commence from the 1st of November following. We have considered the case, and quite agree with the learned Judge in the first proposition laid down by him, namely, that where the father and son were of the same name, and no distinguishing *affix* is used, the presumption is, that the father was the life intended by the parties. It is unnecessary to refer to the old cases which establish this point; they are all collected in the recent case of *Stebbing v. Spicer* (a). But with great respect to the learned Judge, we have been unable to discover any circumstances in the case whatsoever to rebut that presumption. The positive evidence of Roach, of course, was altogether the other way, and must have been discredited by the jury; but striking out this evidence, the only other fact in the case is, that Patrick Fleming the elder

(a) 8 Com. B. 827.

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was a very old man ; and if there was any presumption or rule of law which gave the lessee or tenant the right to elect who should be the life in his lease, no doubt the clear presumption would be that the young, and not the old man, would have been selected by him ; but we are not aware of any such rule, nor have we been referred to any authority in support of any such ; and, therefore, we are of opinion that the learned Judge should have held at the trial, and so directed the jury, that Patrick Fleming the elder was the life in the lease. I may also mention that if, at any further trial that may be had, any evidence shall be given calculated to rebut the presumption that the Patrick Fleming the elder was the life in the lease, it will deserve serious consideration whether the case should be left to the jury, as it has in the present case, for them, under all the circumstances, to say who was the life intended by the parties, or whether he should not leave to the jury the question whether the facts and circumstances existed, and himself decide whether those facts and circumstances were sufficient to rebut the presumption which would otherwise arise. We do not think it right to decide this matter one way or the other, it not having been argued before us ; but we have thought it right to suggest it to the Counsel of the parties, as a matter to be considered at the next trial. We also are of opinion that the clause I have mentioned in the lease, as to the lessee's retaining the possession, is not sufficient to grant any legal estate to the lessee. The intention of the parties was not that the lessee should remain in possession until, by receipt of the rents and profits, the debt was discharged ; in which case the tenant might be held to have an estate resembling that of the now antiquated *elegit creditor*. There does not appear anything to prevent the tenant enforcing the payment of the debt due to him, or preventing the lessor discharging it ; and it is not possible to hold that the proviso in question created a *freshold estate*, or one for any certain term of years ; and, therefore, on the whole, we are of opinion that, at the trial, the learned Judge should have directed a verdict for the plaintiff ; and, therefore, that the verdict had for the defendant must be set aside, and a new trial directed. We have not thought it necessary to say anything as to the point made, for the first time, in

the argument before us, as to the lease of August 1832 being a freehold lease, to commence *in futuro*. Should such a point be suggested, at the next trial, some answer may be given which it is not for us now to suggest.

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Verdict set aside; new trial ordered.

WALLACE v. CARROLL.

June 4.

THIS was an action for slander. The first paragraph of the summons and'plaint alleged that the plaintiff, at the time of the committing of the grievance, was the paid matron of a certain institution called "Dublin by Lamplight," where the clothes and linen of families and individuals were washed by the inmates of said institution, for certain charges, &c.; that she was a person of good name, &c.; that before the speaking, &c., the defendant procured possession of four handkerchiefs of the plaintiff, which were marked with the plain-

The defendant, who was the secretary of a charitable institution for the reformation of fallen females, called "Dublin by Lamplight," where the clothes and linen of families and individuals were washed

by the inmates of the institution, was sued by the plaintiff, who had been the paid matron of the house, at the time in question, for having spoken, in the presence and hearing of several of the inmates of the institution, as well as of divers other persons, addressing the plaintiff, and holding certain handkerchiefs in his hand, "Who authorised you to forge your name on the handkerchiefs of Mrs. —?" (one of the parties for whom the institution did washing); also the words, "Women, look at it! it is the proof of your matron's guilt." The defendant pleaded a defence stating the objects of the institution, and the nature of his duties therein; and the fact of certain property having been purloined, and found under circumstances calculated to awaken suspicion; and he then alleged that, in the discharge of his general duty, as secretary, and by direction of the committee, he inquired into the matter, in the presence of the plaintiff and certain of the inmates, who were interested in the subject-matter of the inquiry, and who themselves had made charges against the plaintiff; and that on that occasion, and in the discharge of his duty, &c., and acting *bona fide* within the scope of his authority, and without malice, he spoke the words, believing them to be true.

Held, on demurrer to the defence, first, that the facts therein stated showed that the occasion of speaking the words was privileged.

Secondly; that the defendant did not forfeit his privilege, in consequence of his mode of conducting the investigation.

Thirdly; that the presence, on the occasion in question, of other persons besides those interested in the inquiry, did not affect the question of privilege.

Fourthly; that, though not expressly averred in the defence that the occasion of speaking the words therein referred to was the same as that stated in the summons and plaint, it appeared to be so by necessary intendment.

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tiff's name; and whilst defendant had possession of same, and held three of same folded, and one open in his hand, he falsely and maliciously, in the presence and hearing of certain inmates of the said institution, and of divers other persons, spoke and published of and concerning the plaintiff, and of and concerning her in her said office of matron of the said institution, and of and concerning the said handkerchiefs and the marking thereof, the false, scandalous, malicious and defamatory words following; that is to say, "Will you authorised you" (meaning the plaintiff) "to forge your name on the handkerchiefs of Mrs. —?" (naming one of the customers of the said institution, whose name the plaintiff forgets, and for this reason cannot set forth), meaning thereby that the plaintiff had been guilty of feloniously stealing the handkerchiefs of a customer of the said institution, who had sent them to be washed thereat, and fraudulently placing and marking her own name on said handkerchiefs, as if she were the owner, when, in fact, she was not the owner. It then charged the defendant with having spoken the further words following:—"Women" (meaning thereby certain inmates of the said institution, whom he addressed), "look at it! It is a proof of your matron's guilt;" with an innuendo that the words imputed felony to the plaintiff. There were other paragraphs slightly varying the above words. The innuendos were likewise varied.

The defendant, amongst other defences, pleaded to the whole of the first paragraph as follows:—That he is and was, prior to the 10th of May 1859, the secretary of a certain charitable institution called "Dublin by Lamplight," having for its object the reclamation of prostitutes, of which institution the plaintiff was then the paid matron and servant; and that the affairs of said institution are and were under the control and management of a committee, selected from among the supporters thereof; and that it is and was the duty of the defendant, as such secretary as aforesaid, to act, in all respects, in obedience to the orders of said committee, and to carry out the measures resolved upon by said committee, relative to the management of said institution, and the government of the inmates thereof; and that the plaintiff, as the matron of said institution

was the person responsible, in the first instance, for the proper discipline of the inmates thereof; that it was the duty of the defendant, as such secretary, and within the scope of his authority as such, to inquire into all matters and allegations relating to the conduct of the inmates and the several paid servants of the institution, including the plaintiff, and the safe custody, by said inmates and servants, of the several articles the property of the customers of said institution, sent to be washed at the laundry by said inmates and servants; and also to investigate all charges against any of the said inmates and servants, and thereupon to correct and reprove said inmates and servants in relation to same, with a view to the admonition and improvement of such servants and inmates, and the prevention and detection, within the said institution, of all acts of impropriety; and that the inmates of said institution were interested in the conduct of such servants, including the plaintiff, and in the due care by them of said property. That, while the plaintiff continued such matron, and the defendant such secretary as aforesaid, complaints were made to the defendant, as such secretary, and also to certain of the servants of said institution, by divers persons, customers thereof, about certain alleged irregularities in the return of certain clothes and linen, sent by such customers to be washed at the laundry of said institution; and that the tendency of such complaints was to cause suspicion of dishonesty to attach upon the servants and inmates of said institution; and charges were made against the plaintiff, by certain of the inmates, who alleged that such irregularity was due to the acts of the plaintiff, and that portions of the property of the said customers had been seen by them in the laundry, marked with the name of the plaintiff, as if said articles were her own property; that the inmates were employed in the laundry, and were responsible for the articles so sent to be washed thereat, and were liable to be peremptorily expelled, if detected in any act of dishonesty, or breach of the rules of said institution. That after such complaints had been made, &c., there was found, among the clothes and linen which was being washed at the laundry of said institution, a certain handkerchief, upon which was marked two names, one of these names being the name of the said

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plaintiff, written in addition to, or in substitution for, a certain other name; that the fact of the finding of the said handkerchief having been brought under the notice of the said committee, the defendant was directed by said committee to make inquiries of, and to question, the plaintiff in relation to same; that, in obedience to the order of the said committee, and in discharge of his duty, as such secretary as aforesaid, he did inquire into said matter, in presence of the plaintiff and certain inmates of the said institution, who were all, as defendant *bona fide* believed, interested in the subject-matter of said inquiry, and who, or some of whom, had made such charges against the plaintiff; and upon such occasion, in discharge of such his duty as such secretary, and acting, as defendant *bona fide* believed, within the scope of his authority as such, and with a view to the *bona fide* discharge of his duty, as hereinbefore stated, the defendant spoke the words in the first paragraph of the summons and plaint *set forth* *bona fide* believing same, as in said paragraph explained, to be true and without malice in fact, as he lawfully might, for the case aforesaid.

Similar pleas were pleaded to the second and third paragraphs.

The plaintiff demurred to these special defences, upon grounds fully stated in the judgment of the Court.

Harrison (with whom was *Fitz Gibbon*, Serjeant), in support of the demurrer.

The facts pleaded did not warrant an imputation of felony: *Ede v. Scott* (a). It is not shown how it became the duty and interest of the defendant to make this charge against the plaintiff, in the presence of persons not inmates of the house, whose presence is not denied: *Dickson v. Earl of Wilton* (b). The case is clearly distinguishable from *Somerville v. Hawkins* (c), as there it was evident that the defendant had such a duty and an interest as entitled him to make the communication. The plea ought to have averred the identity of the occasion referred to with that stated in the summons and plaint.

(a) 7 Ir. Com. Law Rep. 609.

(b) 1 F. & Fin. 412.

(c) 10 C. B. 582.

S. Walker and *J. E. Walshe*, contra.

It is sufficiently shown that the defendant had a duty to make this communication, in consequence of the office which he held in the institution, and that it was made to parties having an interest in the subject-matter: *Harrison v. Bush* (a); *Toogood v. Spyring* (b); *Coxhead v. Richards* (c); *Amann v. Damm* (d); *Hopwood v. Thom* (e). It is for the jury to say whether, from the mode in which the communication was made, there was express malice: *Cooke v. Wildes* (f); *Ruckley v. Kiernan* (g). The presence of a third person, at the time of making the communication, does not affect the privilege: *Taylor v. Hawkins* (h). As to the objection that we should have put an averment into the defence of *quæ est eadem*, it appears, by necessary implication, that the same transaction was referred to.

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Fitz Gibbon, in reply, cited *Robertson v. M'Dougall* (i), and *Tuson v. Evans* (k).

Cur. ad. vult.

The judgment of the Court was now delivered by—

BALL, J.

This case comes before the Court on a demurrer by the plaintiff to the defendant's third defence to the summons and plaint. The action was for slander; and it was brought by the plaintiff, who had been the matron of a charitable institution known as "Dublin by Lamplight," against the defendant, a clergyman of the Established Church, and secretary of the institution. The plaint states, that the female inmates of the institution were employed in washing the clothes and linen of families and individuals, for certain charges and remuneration in that behalf; and that upon one occasion the defendant had procured four handkerchiefs of the plaintiff's, which

June 12.

(a) 5 Ell. & Bl. 344.

(c) 2 C. B. 569.

(e) 8 C. B. 293.

(g) 7 Ir. Com. Law Rep. 75.

(i) 4 Bing. 670.

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(b) 1 C., M. & R. 181.

(d) 29 L. J., N. S., C. P., 313.

(f) 5 Ell. & Bl. 323.

(h) 16 Q. B. 308.

(k) 12 Ad. & El. 773.

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were marked with the plaintiff's name, and, holding them in his hand, he spoke in the presence and hearing of certain of the inmates of the institution, as well as of *divers other persons*, the words following, that is to say:—"Who authorised you," addressing the plaintiff, "to forge your name on the handkerchiefs of Mrs. —?" one of the customers of the institution. The plaint further states that, on the same occasion, the defendant spoke the further defamatory words, addressing the inmates then present, that is to say:—"Women, look at it" (meaning thereby one of the handkerchiefs which he so held in his hand); "it is the proof of your matron's guilt." The plaint then avers that, by reason of such the conduct of the defendant, the plaintiff had been deprived of her situation of matron, and otherwise injured, as in the plaint mentioned. The foregoing is the substance of the first paragraph of the plaint; and there are two further paragraphs, varying, to some extent, the statement of the words complained of, but which, for the purpose of this judgment, it is unnecessary to particularise.

To each of the three paragraphs of the plaint the defendant has filed three several defences; but it is with the third defence only to each paragraph we have any concern on the present occasion; they are, all three, in substance the same; and it becomes necessary to state the matter of them in some detail, in order to render intelligible the application of the law to the questions thereby raised for our decision.

The third defences state that the affairs of the institution (whereof the plaintiff had been the paid matron and servant, and the defendant the secretary) were under the control and management of a committee, selected from among its supporters; and it avers that it was the duty of the defendant, as such secretary, to act, in all respects, in obedience to the orders of the committee, and to carry out the measures resolved upon by them, relative to the management of the institution, and the government of the inmates thereof; it further avers, that the plaintiff, as matron, was the person responsible, in the first instance, for the proper discipline of the inmates; and it also avers, that it was the duty of the defendant, as such secretary, and within the scope of his authority as such, to inquire

into all matters and allegations relating to the conduct of the inmates, and of the several paid servants of the institution (including the plaintiff); and also into all matters relating to the safe custody, by such inmates and servants, of the several articles (the property of the customers) sent there to be washed; it states, moreover, that it was the duty of the defendant to investigate all charges against any of such inmates and servants, and, thereupon, to correct and reprove them in relation thereto, with a view to the prevention and detection of all acts of impropriety within the said institution; and the defence further states, that the inmates were interested in the conduct of the servants of the institution (including the plaintiff), and in the due care by such servants of the property of the customers; it also states, that complaints had been made to the defendant, as such secretary, and also to certain of the servants of the establishment, by some of the customers thereof, as to irregularities occurring in the return of clothes sent there to be washed; and it alleges that the tendency of such complaints was to cause suspicion of dishonesty to attach on the servants and inmates of the establishment; it further avers that charges had been made against the plaintiff, by certain inmates, who alleged that such irregularities were due to the acts of the plaintiff; and further alleged, that some of the articles sent there to be washed had been seen by them, in the laundry, marked with the name of the plaintiff, as if they had been her own property; the defence further averred, that the inmates were employed in the laundry, and were responsible for the property of the customers, sent there to be washed, and were liable to be peremptorily expelled, if detected in any act of dishonesty. The defence then sets forth that, after such complaints had been made, and such charges had been brought forward, there was found among the clothes and linen sent to be washed a certain handkerchief, upon which were marked two names, one of them being that of the plaintiff, written in addition to, or in substitution for, a certain other name; and it states, that the fact of the finding of the said handkerchief, so marked, had been brought under the notice of the committee, and that thereupon the defendant was directed, by the committee, to make inquiries from the plaintiff,

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and to question her in relation thereto. The defence then states that, in obedience to such the orders of the committee, and moreover in discharge of his general duty as secretary, as before detailed, the defendant did inquire into the said matter, in presence of the plaintiff, and of certain of the inmates, who were interested in the subject-matter of the said inquiry, and who had themselves made charges against the plaintiff, as aforesaid; and it then avers that, upon that occasion, and in discharge of such his duty as secretary, and acting as he *bona fide* believed within the scope of his authority as such, the defendant spoke the words complained of, believing them *bona fide* to be true; and that he so spoke them without malice in fact, as he lawfully might, for the cause aforesaid.

To these three defences the plaintiff has demurred, and has relied upon the following causes of demurrer:—

1.—That the defences have not shown that the words were spoken upon a privileged occasion.

2.—That they have not shown that they were spoken in the proper and necessary discharge of the defendant's duty.

3.—That the defences have not denied the allegation of the plaintiff that the words were spoken in the presence and hearing of other persons besides the inmates, and that they have not averred that the words were not spoken in the presence and hearing of such other persons.

4.—That the occasion of the speaking of the words sought to be justified by the defences is not averred to have been the same occasion as that mentioned in the plaintiff's plea.

As to the first ground of demurrer, viz., that it has not been shown that the words were spoken on a privileged occasion, we are of opinion that it has not been sustained. In pronouncing the judgment of the Court of Queen's Bench in England, in the case of *Harrison v. Bush* (a), Lord Campbell laid down the principle of law as to what renders privileged the occasion on which words otherwise actionable may have been spoken, in the following terms:—"During the argument in this case (says his Lordship, "a legal canon was propounded by the plaintiff's Counsel for our

(a) 5 Ell. & Bl. 348-9.

“guidance; and this we are willing to adopt, as we think it supported by the principles and authorities upon which the doctrine of privileged communication rests. It is this; a communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without the privilege, would be slanderous and actionable.” And again:—“Duty in the proposed canon cannot be confined to legal duties which may be enforced by indictment, action or mandamus, but must include moral and social duties of imperfect obligation.” Accordingly, do we find in this case, first, a duty imposed on the defendant to make the communication complained of, and, secondly, a corresponding interest in receiving the communication on the part of the persons to whom it was addressed? If we do, both the conditions involved in the legal canon adopted by the Court of Queen’s Bench are satisfied; and the occasion upon which the words were spoken by the defendant was privileged. That the defendant was bound, in the general discharge of his duty as secretary, to make the communication complained of, appears by the averments of the defence demurred to; it was his duty to inquire into all matters and allegations relating to the conduct of the inmates and paid servants of the institution (of whom the plaintiff was one), in reference to the safe custody of the linen and other articles sent to the institution for washing; it was his duty also to investigate all charges against those persons, and to correct and reprove them in relation thereto; and, further, it was his duty to endeavour to prevent and detect improprieties of conduct of every description on the part of such persons.

The defence then alleges the fact of the finding of the handkerchief with the name of the plaintiff marked thereon, in addition to, or in substitution for, the name of another person; and it avers that *that* fact having come under the notice of the committee, the defendant, whose duty it was to obey their directions, was specifically enjoined by them to make inquiries, and to question the plaintiff in relation to that transaction. Such is the case of duty relied on by

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the defendant, as warranting him to make the communication in question. And now, as to the second condition comprised in the legal canon referred to, viz., the interest which the persons addressed by the defendant had in the matter of the communication; the defence sets forth that the inmates of the establishment, in whose presence the words were spoken, were interested in the communication being made to them by the defendant, for the reasons following: that is to say, some of the customers had complained of irregularities in the return of their property sent to be washed by the inmates of the institution; and suspicions of dishonesty had, in consequence, attached upon the inmates, who were responsible for the safe custody of the property; they were interested, therefore, in having such suspicions removed from their characters, by the detection and exposure of the plaintiff's misconduct. Again, the inmates in whose presence the words were spoken had themselves charged the plaintiff with dishonesty, in relation to the abstraction of the property of the customers, and were consequently interested in having the truth of the charge they had made substantiated, by the disclosure made on that occasion by the defendant, and thereby freeing themselves from the imputation of having brought forward a false accusation. Thus it appears very plain to us that the persons in whose presence the words were spoken were clearly interested in the communication being made to them; and, accordingly, we conclude that the duty of the defendant to make the communication, and the interest of the inmates in having it made to them concurring, the occasion of speaking the words was privileged; and, consequently, the first ground of demurrer must be overruled. The second ground of demurrer, viz., that it has not been shown that the words were spoken in the proper and necessary discharge of the defendant's duty, must also be overruled.

The argument of the plaintiff's Counsel to sustain this ground of demurrer proceeded thus:—Assuming that the occasion was privileged, and that the defendant would have been warranted, upon the averments in his defence, in proceeding to investigate the complaint against the plaintiff, and examining her in relation thereto, and even correcting and reproving her, if necessary, and would have

been warranted, moreover, in doing all this in the presence and hearing of the persons whom he addressed, still he was not justified by the occasion in imputing to the plaintiff the commission of felony; and, by doing so, he forfeited the privilege to which he would have been otherwise entitled.

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The answer to this view is supplied by the decision of the Queen's Bench in England, in the case of *Cooke v. Wildes* (a). This was a decision arrived at by the Court, after a review of all the authorities. Lord Campbell, who tried the case, had upon the trial followed a decision of the Queen's Bench, in the case of *Tuson v. Edwards* (b); and, although he was of opinion that the defendant was privileged by the occasion to state certain matters pertinent to an investigation proposed to be entered upon, his Lordship considered that he had exceeded his privilege by making, at the same time, defamatory charges against the plaintiff; and, on the authority of *Tuson v. Edwards*, he took it upon himself to decide that the defendant's privilege had been wholly forfeited; and the only question he left to the jury was the amount of damages to which the plaintiff was entitled. However, upon a motion for a new trial, the Court held that the course so taken by Lord Campbell was erroneous; and they overruled the decision in *Tuson v. Edwards*, as not consistent with the current of authorities; and they held that, where the occasion was privileged for the making of certain statements, but further statements were made, beyond those so privileged, it was for the jury to determine on the trial whether the matter so stated, in excess of the privilege, afforded sufficient evidence in fact, on the part of the defendant, to warrant them in finding a verdict against him on the whole of the case; but they held also that it was not for the Judge to decide whether the statements so made in excess of the privilege afforded evidence of malice on the part of the defendant, so as to furnish an answer to the immunity which he might otherwise claim, by reason of the occasion being privileged. Accordingly, it being a matter for the jury, and the jury alone, to determine on the trial, it cannot be for the Court to decide it on this demurrer, which, consequently,

(a) 5 E. & B. 328.

(b) 12 Ad. & Ell. 733.

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must be overruled. In the case of *Ruckley v. Kiernan* (a), the Court overruled, on demurrer, an objection taken on the same ground as the foregoing; following, in that respect, the judgment of the Queen's Bench in England, in *Cooke v. Wildes*, and, consequently, holding the case of *Tuson v. Edwards* to have been overruled.

The third ground of demurrer, viz., that the defendant has denied the allegation in the plaint, that the words were spoken in the presence and hearing of other persons besides the inmates, is encountered by the direct authority of the case of *Toogood v. Spyring* (b), which decides that, supposing the communication to be otherwise protected, the circumstance of its having been made to other persons besides those interested will not deprive it of its privilege; accordingly, this ground of demurrer fails also.

The fourth ground of demurrer is, that it is not averred that the occasion of the speaking of the words sought to be justified by the defence is the same occasion as that mentioned in the plaint; but we are of opinion that it sufficiently appears by the defence that the occasions are the same; and, even if there be no formal averment to that effect, the want of it would be ground for special demurrer only. Accordingly, the demurrers must be all overruled.

(a) 7 Ir. Com. Law Rep. 81.

(b) 1 Cr., M. & R. 181.

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Nov. 17, 19,
 26.

THIS was an action for breach of contract. The first paragraph of the summons and plaint stated that the defendants were carriers by water, carrying goods, &c., in certain steam-ships or vessels between Belfast and Fleetwood; that in consideration that plaintiff, at defendants' request, would ship on board one of said steam-ships, to wit, the "Vanguard," certain cattle for conveyance from Belfast to Fleetwood, for certain freight, &c., the defendants undertook and agreed with plaintiff to carry and convey said cattle carefully and safely, and with reasonable expedition, to Fleetwood, and there re-deliver same to or for plaintiff, within a reasonable time from the said shipment; it then averred that plaintiff, relying, &c., afterwards, to wit, on the 3rd day of January 1860, did ship on board said ship eleven head of cattle, to be conveyed and carried by defendants from Belfast to Fleetwood, there to be delivered, upon the said terms, and did then pay to the defendants all the said freight, and also all charges, &c.; yet that defendants, not regarding, &c., did not carefully or safely, or with reasonable expedition, carry and convey said cattle on the said voyage, and did not deliver them at Fleetwood aforesaid, in a due and reasonable time from their said shipment; but, on the contrary thereof, &c., that said ship was wilfully and wrongfully delayed by defendants, on her said voyage, for an unreasonable time, and by reason thereof, and also by reason of the negligence and carelessness of the defendants in the care of said cattle, said cattle were not delivered in Fleetwood within a reason-

The plaintiff, a cattle dealer, shipped cattle on a steamer plying from Belfast to Fleetwood. The ticket delivered to the plaintiff by the ship-owner contained a clause giving liberty to tow and assist vessels. The steamer, on her voyage, having fallen in with a vessel in distress, towed her to Carrickfergus, and thence returned to Belfast, and, after some delay there, proceeded again to sea, and arrived at Fleetwood several hours after the usual time, in consequence of which the plaintiff was unable to send his cattle to the fair of B. The jury found that the steamer could not with safety have towed the vessel to Fleet-

wood, and that the only safe port to which she could have been brought was Belfast, of which Carrickfergus was a station; and they also found that the arrival of the steamer at Fleetwood was not at all delayed by her return to and delay at Belfast, owing to the state of the tide at the former port.—*Held*, that under the special clause in the contract, the steamer was justified in returning with the vessel to the port of Belfast.

Held also, that the delay which took place after leaving the vessel in port, before the steamer proceeded on her voyage, was not a ground of action, inasmuch as it did not further retard her arrival at Fleetwood.

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able time from their said shipment, and were then reduced in condition and deteriorated in value; and in consequence thereof plaintiff lost his market for said cattle, to wit, the fair of Bolton, and was also obliged to lay out large sums of money in feeding and curing said cattle, and had afterwards to sell them at great loss.

The second paragraph alleged that the contract was subject to the following condition, namely, that the defendants would not be responsible for any damage or loss that might occur to said cattle at shipment, during the passage, whether on deck or at landing, or for losses by delay, should the steamer not sail, according to appointment, or put back from stress of weather, or from delays or loss of any kind, by Railway or any other cause, or for any accident, loss or damage whatsoever from machinery, boilers, steam or steam navigation, nor from any peril of the seas and rivers, nor from any act of neglect or default whatsoever of the pilot-master, engineer, the officers or men, nor from any consequences of the aforesaid causes; with leave to sail with or without a pilot, and to call at intermediate ports, and with liberty to tow and assist vessels. The plaintiff denied that the delay was occasioned by any of the causes referred to in the condition.

The third paragraph set out the special condition of the contract, and then averred that, after the shipment of the cattle, on the 3rd day of January 1860, the vessel started from Belfast, on her voyage to Fleetwood, and that whilst she was proceeding thereon she came up with a certain sailing vessel, which defendants thereon took into tow by the said steam-ship "Vanguard;" that instead of proceeding on their said voyage to Fleetwood, and, if necessary, bringing said vessel so in tow to said last-named port, or else giving said vessel in tow of a certain steam-ship of defendants, to wit, the "Prince of Wales," then passing on her return voyage from Fleetwood to Belfast, the defendants wilfully, negligently and injuriously, and not from stress of weather, turned the said steam-ship, in which plaintiff's cattle were shipped, and brought said ship back to said port of Belfast, and there delayed for three hours before they caused said steam-ship to resume her voyage to Fleetwood; by reason whereof, &c.

The fourth paragraph was founded upon the duty of the defendants as common carriers, and complained that, by the misfeasance, default, improper conduct and negligence of defendants the plaintiff's goods were damaged.

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The defendants pleaded to the first paragraph, that the cattle were not shipped with the defendants as common carriers, nor did the defendants undertake as in the said first count alleged, but that the cattle were shipped by the plaintiff and received by defendants upon the conditions following (setting out the conditions set forth in the second and third paragraphs); that some time after the said ship "Vanguard" had left Belfast with the cattle of plaintiff, and whilst on her voyage to Fleetwood, she fell in with a certain sailing vessel called the "Royal Arch," which was in a state of distress and required assistance, and that the weather was then bad, and threatening to become worse; and that defendants, at the request of the captain of the "Royal Arch," took her in tow, as they lawfully might under the contract; that, although the arrival of the "Vanguard" at Fleetwood was thereby retarded, yet that there was no unnecessary or unreasonable delay in so doing; that, save as was thereby occasioned by taking the said ship in tow, as aforesaid, it is untrue that they did not carefully or safely, or with reasonable expedition, carry and convey said cattle of the plaintiff on said voyage, and that they did not deliver them in a due and reasonable time, as alleged; that they did not carelessly, &c., conduct themselves in the management, &c., of said steam-ship, and that said ship was not wrongfully and wilfully delayed by the defendants on her said voyage, and that they were not negligent and careless in the care of said cattle.

The second defence, in answer to the second paragraph, denied that the defendants had been guilty of negligence or unnecessary delay.

The third defence, pleaded to the third paragraph, further averred that, at the request of the captain of the "Royal Arch," then suffering from stress of weather, they brought her to Belfast, which was the safest port that was near to the place where the said sailing vessel was taken in tow, and was also, in the then prevailing state

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of the weather, the most accessible port for them. The defence also denied that there had been any unnecessary delay, and alleged that the "Prince of Wales" was not within speaking distance.

The defendants pleaded to the fourth paragraph, that the cattle were shipped with them not as common carriers, but under a special contract, subject to the conditions mentioned in the first defence, and they justified accordingly. Issues were framed accordingly.

The action was tried at the last Armagh Summer Assizes, before Fitzgerald, J. It appeared in evidence that the plaintiff, who is a cattle dealer, on the 3rd of January 1860, shipped eleven head of cattle in the "Vanguard," a steam-ship belonging to defendants, who represented the Dublin and Glasgow Steam-ship Company. On payment of £2. 5s. 6d. freight, he received from the agent a receipt containing a clause similar to that stated in the second paragraph of the summons and plaint. The cattle were to be conveyed from Belfast to Fleetwood, being intended for the fair at Bolton. The "Vanguard" left her moorings at five minutes after seven o'clock, p. m., on the 3rd of January, being due at Fleetwood at five o'clock, a. m., on the morning of the 4th. When off the Isle of Man, about midnight, the "Vanguard" was signalled by the African barque the "Royal Arch." The latter was partially disabled; and the "Vanguard" took her in tow, and steamed back to Belfast Lough, where they arrived the following morning. The "Vanguard" dropped the "Royal Arch" off Carrickfergus, but proceeded to Belfast; and, after a delay of some hours there, at between one and two o'clock, p. m., of the 4th, she started again for Fleetwood, where she arrived at six o'clock, p. m., next morning. The cattle had been then thirty-six hours on board. Several of the cattle were, in consequence, severely injured, besides having missed Bolton fair; and the plaintiff computed his loss at £165. 11s. 6d.

The defendants' evidence consisted chiefly of the examination of the captain and pilot of the "Vanguard," who proved that the distance from Belfast to Fleetwood is about 120 miles; the ordinary passage taking from eleven to twelve hours. That the "Vanguard" dropped the "Royal Arch" at Carrickfergus, at twenty minutes after ten o'clock on the morning of the 4th of January; arrived

at Belfast at forty-five minutes after ten, a. m., Belfast time; left Belfast again the same evening, and reached Fleetwood at five o'clock, a. m., on the morning of the 5th. It was also stated that forty-five minutes after seven, p. m., was the time of high water at Fleetwood on the night of the 4th; that the "Vanguard" might possibly have arrived at half-past ten, p. m., that night, but that it would not be safe to enter in the dark, and that it would have been necessary to await daylight; and that if, on dropping the "Royal Arch," the "Vanguard" had proceeded at once to Fleetwood, they did not think that they could have safely gone into the port.

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The learned Judge told the jury that the captain was justified in stopping, and rendering assistance to the "Royal Arch," if she was in distress, and required such assistance; and, further, that he was justified in taking the "Royal Arch" to the nearest port of safety, even though, in doing so, he should deviate from his course to Fleetwood; leaving it to the jury to determine whether the vessel was in such distress. He also told them that it was the duty of the captain of the "Vanguard," immediately on dropping the "Royal Arch," to have resumed his voyage to Fleetwood; and that if, by so doing, and using his utmost diligence, he could have reached Fleetwood at an earlier period, and so as to admit of the landing of the plaintiff's cattle earlier than they were in fact landed, they ought to find for the plaintiff. He further directed the jury to assess contingent damages, reserving leave to the plaintiff to move to enter a verdict, if the Court should be of opinion that the captain of the "Vanguard" was not, on the true construction of the contract, or otherwise, justified in stopping to aid the "Royal Arch," or in returning with her to the port of departure (Belfast), even though that was the nearest safe port. No objection was made by Counsel on either side to this charge; and the jury did not find their verdict until after they had recalled some of the witnesses for further examination. They subsequently found for the defendant. The learned Judge added, that he could not say that the verdict was unsatisfactory, but that he would have been better pleased if they had found for the plaintiff, on the ground of the

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HENDERSON. The plaintiff subsequently obtained a conditional order to have the verdict for defendants changed into a verdict for plaintiff, for £75. 16s. 0d., being the amount contingently assessed by the jury, pursuant to leave reserved, upon the ground of misdirection of the learned Judge, on the contract of shipment set forth in the pleadings, or for a new trial, on the ground that the verdict was contrary to evidence, and the weight of evidence, and to the charge of the learned Judge.

S. B. Millar (with whom was *Meade*) showed cause.

The findings of the jury are conclusive as to the propriety of the course adopted by the "Vanguard." The construction of the clause in the contract, independently of any authority derived from the Common Law, where the preservation of life was concerned, clearly justified the steamer deviating from her course to tow and assist the vessel in distress: *The Arbona* (a); *Lawrence v. Sykbotham* (b). The subsequent delay did not contribute to the further detention of the cattle on board.

Joy and Kernan, contra.

The "Vanguard" was not enabled to deviate from her course. All that the clause enabled her to do was to tow the vessel to Fleetwood. It is not alleged that the deviation was necessary for the purpose of saving the lives of the crew of the "Royal Arch." The fair construction of the contract is this, it gave liberty to tow only between the intermediate ports. Such a deviation would vitiate a policy of insurance: *Abbott on Shipping* (ed. of 1856), p. 183; *Arnould's Insurance*, p. 443; *Davis v. Garrett* (c). The subsequent delay was unjustifiable; and the finding here was against evidence.

Meade, in reply, cited *Tudor's Leading Mercantile Cases*, p. 114.

Cur. ad vult.

(a) 1 Spinks, Admty. Rep., 161.

(b) 6 East, 52.

(c) 6 Bing. 716.

MONAHAN, C. J.

This case comes before us upon an application to enter a verdict for the plaintiff, pursuant to leave reserved by the Judge at the trial, or for a new trial. The action was tried at the last Assizes for Armagh. The plaintiff is a cattle dealer, and brings the action for a breach of contract, respecting some cattle shipped by him on board of the "Vanguard." He proved the shipment of the cattle, and that he received a ticket, which he produced at the trial, and which showed the terms between himself and the Company, and which, amongst other clauses, contained a clause relating to towage of vessels in distress, in the following words.—[His Lordship read the clause.]—The facts, as they appeared in evidence at the trial, were these:—The vessel sailed, at the time fixed, with the plaintiff's cattle on board, which were intended for the fair at Bolton, which is some thirty or forty miles from Fleetwood. Whilst she was bearing close to the Isle of Man, she descried the "Royal Arch" in considerable danger; the captain of the "Vanguard" proceeds to her assistance, takes her in tow, and returns with her to Carrickfergus, within a few miles of Belfast, and leaves her there in safety. The first question which arose at the trial was, whether the provision in the ticket authorised the "Vanguard," whilst on her voyage, going to the assistance of the "Royal Arch," and returning to Belfast; or whether the meaning of the document was not merely that she was to be at liberty to tow vessels in the direction in which she was going at the time? The learned Judge left to the jury the question whether the "Royal Arch" could with safety have been brought to Fleetwood, or any other port in the direction in which the "Vanguard" was bound. The jury found that she could not, and that the only safe port to which she could have been brought was Belfast or Carrickfergus, which was in fact the same, Carrickfergus being virtually a portion of the port of Belfast. On this finding of the jury, the learned Judge held that the "Vanguard" was justified in returning to Carrickfergus; but, as there appeared to be very little authority on the subject, he had the damages assessed, and he reserved liberty to have the

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verdict entered for the plaintiff, if he should have so ruled. The case has been argued before us; no authority bearing on the point has been referred to. We, therefore, are obliged to decide the case, according to the best of our judgment, on principle. Some suggestion was made during the argument, as to a supposed distinction as to the right to deviate for the preservation of life but not for the preservation of property. We cannot sanction any such distinction. We must hold that, under the clause in question, the captain of the "Vanguard" was justified in deviating from his voyage, for the purpose of saving the "Royal Arch" and her cargo; and that Belfast or Carrickfergus being the nearest safe port to which she could be brought, and there being no suggestion that, having regard to all the circumstances of the case, such a deviation was unreasonable, we are of opinion that the ruling of the learned Judge at the trial was quite correct, and that there are no grounds for entering the verdict for the plaintiff. The other question which was discussed at the trial arose in this way:—It appeared that when the captain of the "Vanguard" arrived at Carrickfergus with the "Royal Arch" in tow, he left the "Royal Arch" there; but, instead of at once proceeding to Fleetwood with the "Vanguard," he brought her up to Belfast, and, having delayed some hours there, he then sailed for Fleetwood. The plaintiff, at the trial, insisted that the returning from Carrickfergus to Belfast was altogether unjustifiable, and that the delay thus occasioned entitled him to a verdict. In answer to this, the defendants' Counsel insisted that the arrival of the vessel at Fleetwood was not at all delayed by the delay in returning to Belfast, as, even if the vessel had at once sailed from Carrickfergus, she would have been late for the evening tide at Fleetwood, and should have remained outside the bar until the morning tide; and that, sailing from Belfast at the time she did, she arrived at the landing-place in Fleetwood as early as she could have done had she sailed from Carrickfergus immediately after leaving the "Royal Arch" there.

There was a good deal of evidence on this part of the case. The learned Judge left the question distinctly to the jury, stating

that, if the vessel had not been delayed on its arrival at Fleetwood, plaintiff could not sustain the action. The jury gave the case a good deal of consideration, and, after some time, returned to their box, and re-examined some of the principal witnesses on this part of the case, and ultimately came to the conclusion that, by the delay in Belfast, the vessel was not delayed in her arrival at Fleetwood, and, therefore, found their verdict for the defendants.

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No objection whatsoever was taken at the trial to the charge of the learned Judge; nor was it suggested that plaintiff could maintain the action, unless the arrival of the "Vanguard" at Fleetwood had been delayed by the vessel having been brought from Carrickfergus to Belfast. Though the learned Judge reports he would have been better satisfied if the jury had found differently, still we do not think we would be justified in setting aside the verdict, as against the weight of evidence. No imputation has been cast on the jury; they considered the case fully, and we do not see sufficient grounds to justify us in differing from them. It was during the argument suggested that, even though the finding of the jury were right on the question submitted to them, that it afforded no answer to the action. This depends on the construction of a not very clear or distinct special defence pleaded by the defendants, the issue being, whether it is true, in substance and fact. The plea is as follows:— [states it.]—It certainly may be fairly contended that the substance of the plea is, that the vessel was not delayed in her arrival at Fleetwood, save by the deviation for the saving of the "Royal Arch," in which case the proper question was submitted to the jury; but, if the true construction of the special defence is different, and that it means that the captain of the "Vanguard" was not guilty of any unnecessary delay in the proceeding on or prosecuting the voyage, possibly, if the objection had been taken at the trial, the plaintiff might have been entitled to the verdict. This we do not mean to decide one way or the other; as, even if the plaintiff were entitled to a verdict, still there can be no doubt that, if the finding of the jury be correct, he would be entitled only to nominal damages, as the evidence would be properly receivable in reduction of damages; and, therefore, even if plaintiff were right on this latter

M. T. 1860. point, we do not think the case is one in which we should set aside the verdict, the objection not having been made at the trial; and possibly, we might feel bound to do, if we were of opinion that the plaintiff's construction of the plea was right, and that he was entitled to substantial damages.

Cause allowed against conditional order.

SHERIDAN v. M'CARTNEY.

Nov. 18, 26.

Growing crops are goods and chattels within the Bills of Sale Act (17 and 18 Vic., c. 55), being capable of complete transfer by delivery. Where growing crops were sold to a purchaser by a written instrument, authorising him to enter upon the lands for the purpose of taking possession, and putting a party in charge of the crops:—*Held*, that as the purchaser had acquired no estate in the land, he had not such an actual possession of the crops as dispensed with the necessity of registering the bill of sale.

THIS was an interpleader motion. It appeared by the affidavit of the claimant, Mr. Basil George Brooke, that the defendant being indebted to him in £397, a correspondence ensued between them and that on the 27th of June he received from the defendant a letter, which contained the following:—"I am quite willing to accept your offer, this day come to hand, for the standing and growing crops at Lissanore, with full power and right, from this date necessary for the culture and preparing the land, at £325, in part payment of £397, now due and owing to you. I will send a letter to James Craig, by to-morrow's post, to inform Lough you will be there in course of next week to take possession, and put some one in charge." Immediately after the receipt of the letter Brooke went into charge of the crops, which consisted of standing and growing crops of oats, turnips, flax and potatoes; and he discharged the farm labourers who had been in the defendant's employment, and employed labourers of his own, to tend and cultivate the crops. Brooke retained charge of said crops, and cultivated them until the 17th of August last, when, in pursuance of public advertisements, he sold portions to different persons producing £267, and he continued up to the present time to cultivate the residue. M'Cartney had never, since the sale, been on the lands, nor was any steward, servant or other person, acting

on his behalf, in possession or management thereof. The residue still growing consisted of about six acres of oats, six acres of potatoes, and six acres of turnips. The Sheriff seized those crops on the 4th of September last, and, having been served with a claim on the part of Mr. Brooke, obtained an order for him and the execution creditor to appear, and show cause why they should not maintain or relinquish their respective claims to the property so seized.

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The motion originally came on before Fitzgerald, J., in Chamber, who directed that it should stand for the Full Court.

Kernan and *Devitt*, on behalf of the execution creditor, contended that the crops in question were of the nature of goods and chattels, and, as such, were properly seizable under an execution; and, therefore, were goods and chattels within the meaning of the Bills of Sales Act (17 & 18 Vic., c. 55). There was no evidence of such actual possession as would dispense with the necessity of the registry of the bill of sale.

They cited *Dunne v. Ferguson* (a); *Webb v. Paternoster* (b); *Ward v. Lake* (c); *Taylor v. Waters* (d); *Ward v. Manley* (e); *Sainsbury v. Matthews* (f); *Smith v. Surman* (g); *Evans v. Roberts* (h); *Warwick v. Bruce* (i); *Clarke v. Gaskarth* (k); *Congreve v. Evetts* (l).

Dowse, on behalf of the claimant, argued that although growing crops are, for some purposes, to be regarded as goods and chattels, they are not so, within the meaning of the Bills of Sales Act. They do not come within the Bills of Sales Act, as not being capable of complete transfer by delivery; and even if they did come within that Act, no registered bill of sale was wanting here, inasmuch as Mr.

(a) *Hayes*, Ex. Rep., 540.

(c) *Sayer*, 3.

(e) 11 Ad. & El. 34.

(g) 9 B. & C. 961.

(i) 2 M. & S. 205.

(b) *Palm*, 71.

(d) 7 Taunt. 384.

(f) 4 M. & W. 343.

(h) 5 B. & C. 829.

(k) 8 Taunt. 431.

(l) 10 East, 298.

M. T. 1860. Brooke the claimant had taken actual possession, as far as they could
Common Pleas. be delivered, in their growing state. He got a right to cultivate,
 SHERIDAN and was, therefore, in apparent possession: *Bernard's case* (a);
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 M'CARTNEY. *Holroyd v. Marshall* (b); *Hope v. Hayley* (c).

Cur. ad vult.

MONAHAN, C. J.

Nov. 26. This is an interpleader motion, which originally came before Mr. Justice Fitzgerald, during the Vacation. As the rights of the parties depended more on a legal question than any disputed matter of fact, he, with the assent of the parties, allowed the case to stand for this Court, in order that we might dispose of the case without involving the parties in the expense of a trial before a jury. The facts of the case, as appears on the affidavits, are as follow:—The plaintiff, Mr. G. Sheridan, having obtained a judgment against the defendant, Mr. M'Cartney, issued a writ of *fi. fa.*, under which the Sheriff of the county of Antrim, in the month of August last, seized certain corn and other crops growing on Mr. M'Cartney's demesne, in that county. Mr. Brooke claimed the crops so seized, as having been purchased by him from Mr. M'Cartney, under the following circumstances: Mr. Brooke, it appears, had been, and probably still is, the agent of Mr. M'Cartney; and Mr. M'Cartney being indebted to him in a considerable sum of money, Mr. M'Cartney agreed to sell, and Mr. Brooke agreed to purchase, the crops then growing on the demesne lands belonging to Mr. M'Cartney's residence, for a sum of £325, to be allowed out of the sum so due to him by Mr. M'Cartney. This arrangement was concluded, and is evidenced by certain letters which passed between the parties, the particular terms of which it is necessary to refer to.—[Reads letters.]—It appears that, immediately after this arrangement was entered into, Mr. Brooke put men employed by himself in charge of the crops, dismissing the men previously employed by Mr. M'Cartney; which men, so employed by Mr. Brooke, did everything that was necessary in the cultivation of the crops, such as

(a) 7 Ir. Com. Law Rep. 374.

(b) 29 Law Jour., Chan., 655.

(c) 5 El. & Bl. 830.

weeding, &c., &c., and so continued until the crops were seized by the Sheriff. M. T. 1860.
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The plaintiff, Mr. Sheridan, does not controvert the facts stated by Mr. Brooke, or allege that the purchase made by him was not *bona fide*; but his Counsel insists that the letters on which Mr. Brooke relies should have been registered as a bill of sale of the crops in question, under the provisions of the 17 & 18 Vic., c. 55; and not having been so, that he was entitled to take them under his execution. SHERIDAN
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The case was very fully and clearly argued by Mr. *Dowse*, for Mr. Brooke. He did not dispute the general proposition that growing crops were goods and chattels; but he contended that they are not goods, furniture, fixtures, or other articles capable of complete transfer by delivery, under the 7th section of the Bills of Sales Act, and, therefore, that they do not come within that Act; and he further contended, that these growing crops did not remain in the apparent possession of Mr. M'Cartney, within the provisions of the same section of the Act referred to: and these are in fact the only questions we have to decide. With respect to the first, having regard to the fact that the 7th section expressly provides that the expression "personal chattels" shall not include any stock or produce upon any farm or lands which, by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making or giving such bill of sale, we entertain no doubt that farm produce generally is within the operation of the Act, including growing crops, which was considered to be capable of transfer by delivery, as we have no doubt that the property in such would clearly pass by symbolical delivery, on the ground of good and sufficient consideration, though at the time not in a state capable of being removed; and that the exception applies only to these things, by requiring something more than delivery to transfer the property.

With respect to the other question, whether these crops continued in the apparent possession of Mr. M'Cartney, we are of opinion that the letters on which Mr. Brooke relies, though they transferred

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the property in the crops, did not transfer or pass to Mr. Brooke any estate or interest in the lands, though he had clearly a right to enter on the lands, for the purpose of caring for, cultivating and saving the crops; precisely as a purchaser of growing crops, from a Sheriff, under an execution, or an executor or tenant, in case of emblements, would have a right to enter for similar purposes; but has no estate or interest in the lands. We are aware that, in *Bernard's case*, in the Court of Registry Appeal (7 *Ir. Com. Law Rep.*, p. 374), it was held that, if a rated occupier sets a portion of his land in con-acre, he ceases to be an occupier of the land so given in con-acre. Of that case I shall only say that it may possibly require re-consideration, should a similar case again arise; but, even if that case be rightly decided, it does not apply to the present, as, in that case, the Judge held that the transaction amounted not merely to a permission to take the crop, but an actual demising of the land to the con-acre tenant, for the purpose of taking the crop out of it. In the case of *Dease v. O'Reilly (a)*, the Court of Queen's Bench were of opinion that a con-acre tenant, who planted potatoes in land tilled and manured by the owner, had not any estate in the nature of a tenancy in the lands. There may be some difficulty of reconciling *Bernard's case* with this case before the Queen's Bench. Be this as it may, we do not think that either of these cases applies to the present, in which the lands and crops being M'Cartney's, he sells the growing crops, but does not demise or let the lands on which they are growing; and, therefore, we must hold, in the present case, that these crops remained on land held and occupied by Mr. M'Cartney, within the 7th section of the Bills of Sales Act, and, therefore, in his apparent possession, and liable to Mr. Sheridan's execution. We think a sale of growing crops within the mischief sought to be remedied by the Act; we think that the Act is one which should receive a liberal construction; and, therefore, we declare the goods in question not to be the property of the claimant, Mr. Brooke.

(a) 8 *Ir. Law Rep.* 53.

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House of Lords.

BEAMISH v. BEAMISH.*

(On Appeal from the Court of Exchequer Chamber in Ireland.)

Feb. 21.

THIS case (the facts of which will be found fully reported in 6 *Ir. Com. Law Rep.*, p. 142) having come before the House of Lords for its decision, by way of appeal from the judgment of the Court of Exchequer Chamber in Ireland, and the question of law stated in the following report having been propounded to the Judges for their opinion, the unanimous opinion of those Judges was delivered by Mr. JUSTICE WILLES as follows:—

Since the Reformation, a marriage in this country can be legally contracted only in the presence and with the assent of a clerk in Holy Orders, who must be a third person, and not one of the contracting parties to said marriage. It is, therefore, not competent for a clergyman to marry himself, and such marriage is absolutely null and void.

WILLES, J.

The question is, whether, upon the facts found by the special verdict in this case, the plaintiff below, Henry Albert Beamish, was the legitimate son of the late Reverend Samuel Swayne Beamish?

And the answer thereto depends upon whether, after the Reformation, and before Lord Hardwicke's Act in England, or 7 & 8 *Vic.*, c. 81, in Ireland, a clerk in Orders could effectually contract marriage without the presence of another clergyman; in short, whether a clergyman can marry himself?

In dealing with this question, we must bear in mind that, by direction of the House, the argument proceeded upon the assumption, and it was the opinion of your Lordships, that the case of *The Queen v. Millis* (a) is a binding authority for the proposition necessary to sustain the result therein arrived at, as appears by the record; which proposition is, that a marriage, however solemnly celebrated, was invalid at the Common Law, unless contracted in presence of a priest in Holy Orders.

(a) 10 Cl. & Fin. 534.

* *Coram* WILLES and BYLES, JJ.—HILL, J., was on Circuit.

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That being so, all authorities and arguments tending only to prove that no clergyman need have been present at the marriage are excluded by the hypothesis upon the one hand; whilst, upon the other, it may be considered that if a second clergyman had been present, and had married the father and mother of the plaintiff, the other circumstances in which the marriage actually took place remaining the same, such marriage, however irregular and reprehensible, and to whatever extent it might have exposed all parties to censure and punishment, would have been valid.

The precise question which we are to answer, therefore, is, whether, assuming that by the Common Law the presence of a priest was essential to the validity of a marriage, which involves that at the marriage of a layman there must have been a third person present, the marriage of a clergyman might yet be effectually performed without the presence of anyone other than himself and the person taken as his wife?

We have found it necessary to look at the subject from two principal points of view, in considering the following questions:—

First; whether the history of the law relating to the marriage of the clergy points to any and what distinction in this respect between the clergy and the laity, and herein whether the clergy used at any time to be married in a different manner from the laity?

Secondly; whether the history of the laws requiring the presence of a clergyman as proper for the due celebration of a regular marriage, or essential to the contracting of a valid one, points to any duty incumbent upon the clergyman, such as could not be discharged with equal effect and propriety by one of the contracting parties?

The first of these questions was not much argued at the Bar. It was assumed in general terms, and scarcely disputed, that the marriages of the clergy were prohibited in early times; and it was even argued that one effect of the Reformation may have been to give a new privilege to the clergy, without imposing any restriction as to the manner in which that privilege was to be exercised; in short, that the previous law, when made, may only have applied to the marriages of laymen, and that the marriages of the clergy may stand upon a distinct footing.

We have found it necessary to examine this part of the argument closely, and have arrived at conclusions altogether opposed to the propositions thus put forward, and which we conceive to have an important bearing upon the main inquiry.

In dealing with this first question, it is necessary to refer to the history of the enforced celibacy of the clergy, and afterwards more particularly to the statutes by which, at the period of the Reformation, this restraint was removed. It appears that a distinction existed in that respect between the regular and the secular clergy, and that such distinction was especially observed in this country. The regular, unlike the secular clergy, appear from an early period to have taken what was called the solemn, as distinguished from the simple, vow of chastity, accompanied by an express, not merely a tacit or implied, profession, publicly made, and accompanied by entering into a recognised religious order, and not merely into a lawful ecclesiastical society.

With respect to both classes of the clergy, the general law of the Western Church will be found stated in *Pothier*, "*Traite du Contrat de Mariage*," pt. 3, c. 2, art. 5; "*De l'Empechement que forment les Vœux 'solennels'*" (vol. 6, p. 47, of the Paris edition of 1846, by M. *Bugnet*, to which we shall throughout refer); and art. 6, "*De l'Empechement qui resulte des Ordres Sacres*" (6 *Pothier*, p. 51).

As to the regular clergy abroad, it appears that, before the first Council of Lateran, held in 1123, their marriages were valid; and their profession constituted only "*impedimentum prohibitivum*," not "*impedimentum dirimens*."

The prohibition thus imposed upon the regular clergy included only those who had taken the solemn vow already mentioned, and entered into a regular house of religion. A simple vow of chastity, whether tacit or express, did not of itself constitute an impediment (6 *Pothier*, p. 50, s. 6, *Id.* 213, *et seq.*).

With respect to the regular clergy, professed and entered in a house of religion in England, their condition was, probably from a time before the Conquest up to the reign of Henry the Eighth, considered, for all purposes of personal benefit, as that of civil death; and their marriages, contracted after profession, were, accord-

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ing to the better opinion, absolutely void: *Coke Lit.*, 73, b, *Lit.* pp. 200-2, and the Commentary. The *dictum* referred to in 1 *Rolle's Abridgment, Baron and Feme* (D), *contra*, seems incorrect.

As to the secular clergy, not entered or professed in religion, of the degree of bishops, priests, deacons and sub-deacons, it appears that, except for a short period, under the Code of Justinian (A.D. 529), *lib.* 1, tit. 4, *de Episcopis et Clericis*, mitigated by the effect of the 6th Novel, c. 5, which substituted the penalty of loss of Orders for that of nullity, there was no instance of any law, civil or ecclesiastical, for annulling the marriages of secular clergy, before the twelfth century. The canon of the first Council of Lateran (A.D. 1123), confirmed and more distinctly expressed at the second Council of the same name (A.D. 1133), was the first which decreed the nullity of marriages contracted by persons in Holy Orders. How much this restriction has been treated as one *positivi juris* appears by St. Augustine's question, and the answer of Gregory the Great, 1 *Wilkins' Concilia*, p. 19, and in the present day by the notes to 6 *Pothier*, by *Bugnet*, pp. 51, 53, in which it is stated that the marriages of the clergy are, by reason of the provisions of the Code Civil, no longer subject to any legal impediment in France.

With respect to England, there exist proofs that the marriages of the secular clergy, though considered objectionable by the higher ecclesiastics, constantly occurred, and were not either void or voidable there before the latter part of the twelfth century. Numerous traces of this subject are to be found in the Collection of the Ancient Laws and Institutes of England, published in 1840, under the direction of the Record Commissioners. The earliest is in the Penitential of Theodore, Archbishop of Canterbury (A.D. 660 to 690), where, in c. 18, s. 4 (1 *Ancient Laws*, p. 14), it is laid down that for a married man, raised to Holy Orders, afterwards to cohabit with his wife, is adultery, by reason of the notion, elsewhere expressly put forward, that the Church is his Spiritual Spouse. To the same effect is the fragment of the same prelate, at p. 74, where it is said of such a case, "unde et de carnali fit spirituale connubium. Oportet eos nec dimittere uxores et quasi non habeant sic

"habere; quo salva sit charitas connubiorum et cesset operatio
 "nuptiarum." Then s. 6, p. 14, of the Penitential, treats of priests
 and deacons marrying whilst in Holy Orders: "Presbyter vel dia-
 "conus si uxorem extraneam duxerit in conscientia populi, depo-
 "natur. Si vero adulterium" (explained by the preceding section
 to mean, by reason of his being married to the Church) "perpetra-
 "verit cum illa, et in conscientia populi devenit, projiciatur extra
 "ecclesiam et pœniteat inter Laicos quamdiu vixerit." It is clear
 that this passage relates to actual, not *quasi* wives, because the con-
 text refers to the wives of those who were raised to Orders after
 being married, and makes a distinct provision for the case of forni-
 cation with a woman not the priest's wife, and that of adultery with
 the wife of another.

To the same effect is the Penitential of Egbert, Archbishop of
 York, A.D. 735 to 736: "Si presbyter vel diaconus uxorem duxerit
 "perdant Ordinem suum; et si postea fornicati fuerint non solum
 "ordine priventur sed etiam septem annos jejunent juxta senten-
 "tiam Episcopi."

To the same effect is a document of the tenth century, called
 Institutes of Polity, Civil and Ecclesiastical, to be found in 2 *Ancient
 Laws*, p. 335, c. 22; which recites, as the doctrine of the previous
 Councils, that "it was right if a Minister of the Altar, that is, a
 "bishop, or a Mass priest, or a deacon, married, that he forfeited
 "his Order for ever, and should be excommunicated, unless he
 "should repent, and the more deeply atone. A priest's
 "wife is nothing but a snare of the Devil; and he who is ensnared
 "thereby on to his end, he will be seized fast by the Devil, and he
 "also must pass afterwards into the hands of the fiends, and totally
 "perish," &c.

The same is laid down in Ælfric's Canons, of about the date
 A.D. 1052 (*Wilkins' Anglo-Saxon Laws*, p. 154; 2 *Ancient Laws*,
 p. 345), which state the penalty to be forfeiture of Orders.

The Anglo-Saxon clergy, however, were far from being of one
 mind upon this subject. The law of the Northumbrian priests
 (stated by *Pothier* to be of the tenth century) takes quite a different
 view. It provides, section 35, "If a priest forsake a woman

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(*cwenan*), and take another, let him be excommunicated." The word here translated "woman" is neither the word applied to a wife in the same law, canon 64 ("*æwe*"), nor that applied to a concubine ("*cyfese*"), in other laws of the same period. It may, according to the Dictionary, be translated either wife, woman or harlot.

These ecclesiastical documents only refer to penance and deprivation, not nullity, which indeed they could not impose.

In the laws of the Kings, during the same period, we find no direct mention of the subject of marriage of the clergy whilst in Orders, though there are several in which the duty of chastity is inculcated.

The first is the law of King Edmund (who reigned A.D. 940 to A.D. 946), Ecclesiastical Division, No. 1 (2 *Ancient Laws*, p. 245). The canons called of Edgar (who reigned A.D. 959 to 975), if they can properly be classed as laws, provide specially for the case of a married person raised to Orders (canons 17, 2 *Ancient Laws*, p. 271); and as to the rest, canon 60 enjoins, "That no priest love over much the presence of women, but love his lawful spouse, that is, his Church." The next is the law of Ethelred, who reigned A.D. 978 to 1016, c. 5, No. 9 (1 *Ancient Laws*, p. 307). The last is the law of King Canute (who reigned A.D. 1017 to 1035), Ecclesiastical Division, No. 6.

All these laws enjoin chastity, but under sanctions not involving nullity of marriage.

It seems, therefore, that before the Conquest there was no law, either civil or ecclesiastical, in this country, making Orders *impedimentum dirimens*. Dr. Lingard states (compare 1 *Anglo-Saxon Church*, p. 176; 2 *Id.*, p. 252, *et seq.*), that, at the end of the Anglo-Saxon period, "the married priests at length became sufficiently numerous to bid defiance to the laws of both the Church and State." He expresses an opinion that such marriages first began in the latter part of the ninth, or even as late as the tenth century; and he states that, for three centuries after the mission of St. Augustine, there is no mention of a married priest in any written document. The inference, however, seems hardly reconcilable with

the articulate recognition of the fact of the marriage of priests, and their other intercourse with women, in the Penitential of *Theodore*, who wrote less than a century after Augustine. And Mr. *Kemble*, in his *History of the Anglo-Saxons*, vol. 2, pp. 439, 447, refers to many instances in which the priests are spoken of; and other traces of their marriages occur in ancient documents, as affording an "almost unbroken chain of evidence to show that, in spite of the exhortations of the bishops and the legislation of the Witan, those at least of the clergy who were not bound to a Cœnobitical Order did contract marriage, and openly rear the families which were its issue."

Dr. *Lingard* further states (*History of Anglo-Saxon Church*, vol. 2, p. 254, note 1), that "married priests were, strictly speaking, those who had been married before ordination. After ordination they were more loosely said to marry—*wiffian*, to take wives—when the parties lived together by mutual agreement only; for there existed no legal form by which they could be married." This statement can, however, amount to nothing more than that by the Church their marriages were considered objectionable, though not void, and that there was no ceremony provided other than that by which laymen could be married. The priests who, as a rule, held out against the bishops, and persisted in marrying and in living with their wives, could have felt little difficulty in performing the marriage ceremony for one another.

This state of things appears to have continued long after the Conquest, and after the charter of William had separated ecclesiastical causes from civil, and in the amplest manner transferred the former to the jurisdiction of the bishops; and, indeed, until late in the twelfth century, long after the second Council of Lateran.

The Constitution of Lanfranc, in 1076, only enforced the former law. It allowed priests already married, in certain cases, to retain their wives, and forbade, for the future, the ordination of married persons: "Decretum est ut nullus canonicus uxorem habeat. Sacerdotes vel in Castellis vel in vicis habitantes habentes uxores non cogantur ut dimittant; non habentes interdicanur ut habeant, et deinceps caveant episcopi ut sacerdotes vel diaconos non pre-

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"sumant ordinare, nisi prius profiteantur ut uxores non habeant" (1 *Wilkins' Concilia*, p. 367).

At many subsequent Councils before the year 1175, the language held is uniform, that the consequence of a priest marrying was simply forfeiture of his orders; for instance the Council of London, A.D. 1126, s. 13 (1 *Wilkins' Concilia*, p. 408); and that of Westminster, A.D. 1127, s. 5 (*Ibid*, p. 410). The language of this Council indicates that wives of priests were regarded less unfavourably than their concubines: "Quodsi concubinis (quod absit) vel conjugibus adhæserint," &c. The same can hardly be said of that of Westminster, A.D. 1173 (*Ibid*, p. 474). III. "Clerici focarias non habeant.—IV. Conjugati ecclesias non habeant seu ecclesiastica beneficia." From about this period the change in the law may, we think, be dated.

During the early part of the twelfth century an occurrence took place which shows the then existing state of things in so singular a light that we cannot forbear from calling attention to it. The bishops, on two occasions in the reign of Henry the First, applied to that monarch to punish the marriages of the clergy with the secular arm. Upon the first, when the King required concessions from the Holy See, they were successful; to cite the margin of the account in *Sir Henry Spelman's Codex* (at the end of *Wilkins' Anglo-Saxon Laws*, p. 300)—"Sacerdotes acrius luunt conjugia sua." Upon the second occasion (A. D. 1129), six years after the first Council of Lateran, the result was altogether different, as appears from *Spelman's Codex*, p. 309, referring to the Chroniclers. "Anno 1129, Regis 29, Rex ad Calend. Aug. magnum Concilium Londini tenuit de Uxoribus Sacerdotum prohibendis præsentisque ambo Episcopi cum Suffraganeis suis, Justitiam de eorundem Uxoribus (focarias vocat Parisiensis) Regi concesserunt. Imprudentia ut calumpniabant, Gulielmi Archiep. Cantuariæ, sed aliis omnibus Episcopis consentientibus. Rex autem accepta a Sacerdotibus nummorum mole, Uxores eis permisit denuo, et illusa hoc commento Episcoporum constitutione, ipsi in ludibrium transiere." In 1 *Wilkins' Concilia*, p. 411, the same occurrence is related, without mention of the fine, and the account concludes thus:

"Rex eis omnibus dedit Domum redeundi Licentiam adeoque
 "Domum reversi sunt, nec ullam Vim habuerunt omnia illa
 "Decreta. Cuncti retinuerunt suas Uxores Regis Venia sicut
 "ante fuerant."

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In the year 1175 a change is distinctly observable; for at the Council of London in that year (1 *Wilkins' Concilia*, p. 466), reference is made to a decretal of Alexander the Third, who was Pope in the time of Henry the Second, and the avenger of A'Becket. After providing for the case of the inferior orders of the clergy, it proceeds, "qui autem in Subdiaconatu vel supra ad Matrimonia convolaverint Mulieres etiam invitas et renitentes relinquant."

The constitution of Richard Wethershed, Archbishop of Canterbury (A. D. 1229 to 1231), *Lyndwood's Provinciale*, p. 118, follows the terms of the decretal of Alexander the Third. These constitutions could not of themselves make law, but they may serve to indicate the date at which the discipline of the Council of Lateran was first introduced.

Up to nearly the end of the twelfth century, therefore, it seems that Orders did not constitute *impedimentum dirimens*, but from that time forward until the sixteenth century they did, not absolutely, but subject to the condition that the marriage was valid unless annulled by divorce in the Court Christian during the lifetime of the parties. This point was more than once decided by the Courts of Common Law in cases referred to by Lord Coke in the margin of *Coke upon Littleton*, 136 a, where, after speaking of the four orders of friars, monks, canons, and nuns, he says, "For all these are
 "regular and votaries, and are dead persons in law; but so are not
 "the secular persons, as prebends, parsons, vicars, &c.; and there-
 "fore it is holden in our books, that if a secular priest taketh a
 "wife, and hath issue, and dieth, the issue is lawful, and shall
 "inherit as heir to his father, &c., for (as it was then holden*)
 "the marriage was not void, but voidable by divorce, and after the
 "death of either party no divorce can be had. But if a man
 "marrieth a nun, or a monk marrieth, their marriages were holden
 "void, and the issues bastards, because (as it was then holden) the

* Year Book, 21 H. 7, M, 39 b, in point.

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"marriage was utterly void, for that the nun and the monk were
 "dead persons in the law."

Such was the law up to the passing of the 31 *Hen.* 8, c. 14; for the 1 *Hen.* 7, c. 4, does not mention, and if it included did not annul, marriages, but only gave the Ecclesiastical Courts power to punish by imprisonment clerks guilty of "adultery, fornication, incest, or any other fleshly incontinency."

The 31 *Hen.* 8, c. 14, was the Act "abolishing diversity in opinions." And among other questions therein resolved was, "whether priests, that is to say, men dedicate to God by priesthood, may marry or no." This question it answered in the negative. The second section made the marriage of a priest felony, without benefit of clergy, both in the man and woman. The fourth section enacted that such marriages "shall be utterly void and of none effect," and that the proper ordinaries "shall from time to time make separation and divorces of the said marriages and "contracts." Subsequent sections imposed minor punishments upon concubinage, and subjected the wife in the one case, and the concubine in the other, to the same penalties as the priest. It is observable that this statute related to priests, and not to those lesser orders of clergy* which were included in the general prohibition, and that it pointedly recognised the difference between the wife and the concubine of a priest, clearly pointing, in the case of the former, to actual marriage.

The Act of 31 *Hen.* 8, c. 14, was amended in the following year (1540) by the 32 *Hen.* 8, c. 10, an Act "for moderation of Incontinence by Priests," by which the penalty of death was taken away, and minor pains were substituted.

Thus matters stood until the passing, in the year 1548, of the Act of 2 & 3 *Edw.* 6, c. 21, "An Act to take away all Positive "Laws against the Marriage of Priests," the recital of which is material:—"Although it were not only better for the estimation "of priests, and other ministers of the Church of God, to live "chaste, sole and separate from the company of women, and the "bond of marriage, but also thereby they might the better intend to

* See for the probable reason, *Lynd.* 118, n. (i).

“the administration of the Gospel, and be less intricated and troubled with the charge of household, being free and unburdened from the care and cost of finding wife and children, and that it were most to be wished that they would willingly and of themselves endeavour themselves to a perpetual chastity and abstinence from the use of women ; yet, forasmuch as the contrary hath rather been seen, and such uncleanness of living, and other great inconveniences not meet to be rehearsed, have followed of compelled chastity, and of such laws as have prohibited those (such persons) the godly use of marriage, it were better, and rather to be suffered in the Commonwealth, that those which could not contain should, after the counsel of Scripture, live in holy marriage, than feignedly abuse, with worse enormity, outward chastity or single life.” The statute goes on to enact that every law and laws positive, canons, constitutions and ordinances heretofore made by authority of man only, which do prohibit or forbid marriage to any ecclesiastical or spiritual person which, by God’s law, may lawfully marry, in all and every article, branch and sentence, concerning only the prohibition for the marriage of the person aforesaid, shall be utterly void, and of none effect ; and that all manner of forfeitures, &c., “concerning the prohibition for the marriage of the persons aforesaid be of none effect, as well concerning marriages heretofore made by any of the ecclesiastical or spiritual persons aforesaid, as also such which hereafter shall be duly and lawfully had, celebrate and made betwixt the persons which, by the laws of God, may lawfully marry.”

Then follows a proviso showing the anxiety of the Legislature that the marriages of the clergy should be subject to the same rules, and contracted with the same ceremonial, as those of the laity :—
 “Provided that this Act, or anything therein contained, shall not extend to give any liberty to any person to marry, without asking in the church, or without any ceremony being appointed by the order prescribed and set forth in this book, entitled ‘The Book of Common Prayer and Administration of the Sacraments,’ &c., anything above-mentioned to the contrary in anywise notwithstanding.”

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Doubts appear to have arisen upon that statute, whether it made the children legitimate; and, to remove these doubts, the 5 & 6 *Edw. 6*, c. 12, enacted that such marriages should be valid to all intents and purposes, the children legitimate, and the husbands and wives entitled to estates by the courtesy and dower; with a proviso (section 3):—"Provided always, that this Act, nor anything therein contained, shall extend to give liberty to any person to marry without asking in the church, or without the ceremonies according to the Book of Common Prayer and Administration of the Sacraments, nor shall make any such matrimony already made, or hereafter to be made, good, which are prohibited by the law of God, for any other cause."

These statutes of *Edw. 6* were repealed in 1553 by the statute of 1 *Mary*, s. 2, c. 2, and were revived by its repeal in 1603, by the Act of 1 *Jac.*, c. 25.

During the reign of Elizabeth, the liberty of marriage of the clergy appears to have rested upon the 32nd Article of the Thirty-nine passed in Convocation, and confirmed 1562, and, as to part,* recognised by Parliament in 13 *Eliz.*, c. 12. s. 5, which required subscription and assent thereto; "Bishops, priests and deacons are not commanded by God's law either to vow the estate of single life, or to abstain from marriage; therefore, it is lawful for them, as for all other Christian men, to marry at their own discretion, as they shall judge the same to serve better to godliness."

This inquiry into the history of the law relating to the marriage of the clergy has led us to the conclusion that there is nothing either in the Common or Statute Law which points to any distinction between the clergy and the laity, in respect of any superior facility given to the former as to their own marriages, or the mode of celebrating them. There was no provision for their marriage, at the Common Law, distinct or different from that applicable to laymen. Nor was it likely that there should be, seeing that their marrying was considered by the higher ecclesiastics to be objectionable; as, indeed, the recital of the 2 & 3 *Edw. 6* shows that it continued to be looked upon by many until the dawn of the Reformation; and

* See 1 Hallam's *England*, 4th ed., p. 188.

the statutes of *Edw. 6* and the 32nd Article, upon which the present state of things is founded, expressly put the clergy into the same condition in this respect "as other Christian men;" the statutes, moreover, with a proviso for such marriage taking place after the usual notice, and with the established ceremony, to which the clergy, above all, were in duty bound to conform.

To this must be added that, with the exception of the present case, and of the two unreported cases which were mentioned in argument, viz., *Goole v. Hudson*, in the Court of Arches, 1733, and *Holmes v. Holmes*, in 1814 to 1818, in the Consistorial Court of Dublin, we have not been able to find an authentic account of any instance, nor, except what has been already mentioned, a suggestion of any instance of a clergyman having at any time married himself. This seems the proper place at which to notice those two cases. *Goole v. Hudson* appears to have been a suit instituted in the Arches Court by a clergyman over fifty, and a widower, against the daughter of one of his parishioners, a young woman under age, whom he had induced, on the 10th of June 1731, in the house of her mother, during her temporary absence from home, to go through with him, whilst they were alone, a form of marriage, by their saying that they took one another for man and wife, according to the formulæ in the marriage service; "I, N, take thee, M.," &c., and "I, M, take thee, N," &c.; and by the giving of a ring, with the words "with this ring I thee wed," &c. The other parts of the service were omitted. The libel also stated a promise to marry, independent of this ceremony, and referred in proof thereof to certain letters, of which no copies are forthcoming. There had been no cohabitation; and the prayer was, that a subsequent marriage contracted by her, on the 29th of July 1731, *in facie Ecclesiæ*, with one Boyce, should be declared void; that the proponent and respondent should be declared man and wife, and that she should be compelled to solemnise matrimony with him, *juxta juris exigentiam*. The answer of the respondent admitted that the alleged ceremony had taken place, but stated that it was in jest, and without any intention of contracting marriage. She admitted the letters, and that she sub-

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scribed them as his "spouse," but at his request. The evidence is not before us, but only the interrogatories.

The decree pronounced that the parties "did enter into and celebrate between themselves, on the 10th of June 1731, a pure and lawful matrimonial contract, by words in the present tense effectual," &c.; and went on to pronounce for the validity of the "matrimonial contract and espousals, so entered into and contracted," and pronounced them to be husband and wife, and pronounced and declared the marriage with Boyce to be null, and that the respondent ought to be compelled by law to solemnise a true, pure and lawful marriage, in the face of the Church, with the proponent, and admonished her so to do.

In explanation of this decree, pronouncing the parties to be man and wife, we may remark that, in this respect, it is substantially the same as that in the *Case of Cecilia de Portynton*, in the fourteenth century, cited by Lord Lyndhurst (10 *Cl. & Fin.* p. 841), which his Lordship used as illustrating the proposition that such a contract or espousal was considered as irrevocable, and as *verum matrimonium*, for many purposes, by the Court Christian; although he went on to argue that, for other purposes affecting civil rights, it was not operative before it was celebrated *in facie Ecclesiæ*; and thus Lord Lyndhurst accounted for the decree, after pronouncing the parties to be man and wife, going on to enjoin a solemnisation of the marriage in the face of the Church.

No such case could have occurred in England after 1754, the date of Lord Hardwicke's Act; but in Ireland it could, until 1818, when suits for compelling the performance of a marriage ceremony, and celebration of marriage *in facie Ecclesiæ*, were first put an end to there.

The case of *Holmes v. Holmes*, in the Consistorial Court in Dublin, first came before it in 1814, in the form of a suit by the woman for the restitution of conjugal rights. In that suit, the present question could not have arisen upon the proceedings, because, as amended, they stated a marriage generally, according to the rites of the Church, but did not state any celebration of the marriage by the respondent as a clergyman in Holy Orders. That

suit was dismissed without prejudice, and without costs. A suit was then instituted by the woman, similar to that in *Goole v. Hudson*; and the further amended allegation of the promovent stated that the impugnant being a clergyman in Holy Orders, a ceremony of marriage was celebrated between them on the 11th of April 1811, in the same manner as that which appears by the special verdict to have been performed in the present case, except that no ring was used. In that case, there was cohabitation before and after the alleged marriage contract. The respondent denied that he ever promised or intended to marry the promovent; but admitted that, being in her power, and moved by her importunity and threats, and in order to avoid exposure, he had, on the occasion alleged, read portions of the marriage service, but not the entire thereof, and not as a celebration of his marriage, but in order that she might obtain a more solemn promise or contract than she thought she otherwise could; and that he did not intend it to be binding on him as a legal ceremony, or as a legal or sufficient contract. The alleged ceremony of marriage was proved by one witness, who was present; and her evidence was confirmed by that of another witness, whom the defendant had sent for the prayer-book. These seem to be the material facts.

The decree pronounced that the parties did, on the 11th of April 1811, make a valid matrimonial contract, and take one another, *per verba de presenti*, as man and wife; and it ordered that a lawful marriage should be celebrated in the face of the Church, by a priest in Holy Orders of the Church, according to the rites, ceremonies and canons thereof; and enjoined both parties to enter into and cause the said marriage to be solemnised *in facie Ecclesiæ*.

We have no account of the argument, or of the judgment of the Court, in either of these cases; and we cannot tell upon what grounds the decrees respectively proceeded. The same decrees would have been made if the husbands had been laymen. Whether the Court considered the fact of their being in Orders, and intended to decide that it made no difference in the effect of what had been done, or whether the matter passed *sub silentio*, we cannot tell, and have no means of ascertaining.

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We cannot, therefore, treat these cases as of any binding authority. All that can be said of them is that, except the present case, they are the only authentic instances, within our knowledge, in which such a course was adopted; and that what was done in those cases does not appear to have been treated as constituting a complete marriage.

It has, however, been argued that the course pursued, though admitted and proved to be eccentric, does not transgress the bounds of irregularity; and it was endeavoured to sustain that proposition, by taking the usual ceremony of marriage to pieces, and showing that each of its parts in succession might be dispensed with as unnecessary, except the presence in fact of a clerk in Holy Orders; which presence, in this case, literally there was, for the intended husband was a clergyman, and was present.

This brings us to the second proposed head of inquiry; namely, into the history of the law requiring the presence of a clergyman as proper or necessary at the celebration of a marriage, for the purpose of ascertaining the character of his functions, in order that we may thus be in a condition to determine whether they can properly or effectually be discharged by one of the contracting parties.

This inquiry again divides itself into three branches: in respect of, first, the religious character of the ceremony; second, the notoriety and proof of marriage; and, third, the prevention of such marriages as are forbidden by law.

First: is the clergyman required to be present only as an ecclesiastical entity representing the Church, for the purpose of giving a religious character to the ceremony, and of invoking, by ordained lips, the blessing of Heaven upon the union; and is this all that he has to do? Because, if so, all this is supplied by the fact of one of the two contracting parties being ordained. If these are all the uses of the officiating clergyman, it is in vain to argue that a man cannot invoke a blessing upon his own marriage, in the form and substance of the nuptial benediction, as used from the earliest times. It seems inconceivable that such or any benediction can emanate, in any respect, from, though in terms it need not include, the human being who pronounces it; or that a blessing is anything more than

a prayer to The Almighty that He will vouchsafe to bless those who are its object. If such be the office of the clergyman, it is in vain to say that marriage was formerly in this country, as now in the Church of Rome, considered as a Sacrament; and that a person could not administer it to himself; or to cite authorities to show that, in the opinion of theologians, a man cannot administer one Sacrament, that of Baptism, to himself. The contrary is established and enjoined as to the Sacrament of The Lord's Supper. The contrary is maintained by a host of authorities as to marriage itself, when considered as a Sacrament.

The next view which has been suggested is, that the law requiring the presence of a clergyman as essential is not sufficiently explained by the desire to introduce a religious element alone, and that it was intended that he should be present as a trustworthy witness to the contract, who might be able to form a judgment whether the parties take one another, freely and entirely, for man and wife, and to bear witness thereafter to the fact. If that view be adopted, a strong reason will suggest itself why the clergyman who marries the parties ought to be a third person; because the ceremony of a clergyman being present at his own marriage is not, in point of notoriety and the preservation of evidence, the same as, nor equivalent to, that which the law, in this view of it, would require, as generally necessary to the validity of a marriage; namely, the presence of a clergyman as a witness thereto.

The remaining view of the office of the clergyman suggests the inquiry whether he has, indeed, but a passive part in the ceremony; so that, although his presence is necessary as a witness, yet that, being present, he cannot prevent the parties from marrying one another, whatever may be the impiety or illegality of the proceeding; or whether, on the contrary, he really has an active duty or choice in this matter? Whether he may not require the proper steps to be taken to make the marriage regular, before he allows of its celebration? Whether, if a probable objection were urged to the marriage, and sufficient security given, he could effectually postpone it? Whether, if he knew of a "just impediment why the parties should not be joined together in holy matrimony"—such an impediment

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as before Lord Lyndhurst's Act (5 & 6 W. 4, c. 54) would have left the marriage valid for all civil purposes, unless and until it was annulled by a decree of a Court Christian, pronounced during the lifetime of the parties, and until then would have left them man and wife—he had authority to forbid the incestuous union, or possessed no means of repelling the profanation, except by taking to flight before the words of consent were gabbled in his presence? In fine, whether the clergyman has power to prevent the marriage, by dissent?

Should this question be answered in the affirmative, it will be obvious that the intended husband cannot properly be the person to marry the parties. It would be irrational to entrust the person whose interest it is to effect the marriage with the duty of saying whether it be fit that it should take place. It is no sound argument to say that a third person might neglect his duty by passing over objections to the regularity, decency or other requisites of a properly conducted marriage, and that if he did so the parties might notwithstanding become man and wife. If the law demands the presence of an officer upon whom the duty is imposed of requiring the observance of the conditions under which the marriage ought to take place, it is not because that duty may be disregarded by the proper person to fulfil it, and yet the marriage stand good, and censure and punishment of the offender be the only consequence, therefore that the duty may be and is entrusted to a person whose interest it must be to disregard its fulfilment in every instance in which that could be efficacious.

We proceed with the object of ascertaining the true answers to these several questions; and in doing so your Lordships are aware to how great an extent we are assisted and anticipated by the argument and the judgments in *The Queen v. Millis*, and also by those in the present case, both here and in the Court of Exchequer Chamber in Ireland. It is no part of our duty or our design to repeat what has already been better said by others; but it is necessary for us to make a general statement of what we conceive to be the law; to consider the authorities which have been relied upon as

bearing more particularly upon the present case; and to state such new matter as we think worthy of consideration.

The general law of Western Europe, before the Council of Trent, seems clear. The fact of marriage, namely, the mutual consent of competent persons to take one another only for man and wife during their joint lives, was alone considered necessary to constitute true and lawful matrimony, in the contemplation of both Church and State.

This is fully established by the authorities collected by *Pothier* in the *Treatise* already referred to, part 4, c. 1, s. 3, sub-s. 31, p. 152:—"De l'antiquité de la benediction nuptiale, et de la célébration du mariage dans l'Eglise, et si elles étaient nécessaires dans les premiers siècles pour la validité des mariages;" and sub-section 3, p. 156:—"Du droit qui s'observait dans le douzième siècle, et les suivants jusqu'au temps du Concile de Trente à l'égard des mariages clandestins; c'est-à-dire, qui n'étaient pas célébrés en face de l'Eglise." The author points out that the celebration of the marriages of Christians in the face of the Church, and with the nuptial benediction pronounced by the priest (*nubere in Domino*), dates from the earliest Christian times. He cites a passage from Tertullian, who lived in the second and third centuries, extolling the marriage "*quod Ecclesia conciliat, confirmat oblatio, obsignat benedictio.*" In explanation of the origin of the nuptial benediction, he cites a passage from St. Isidore of Seville, who lived in the fifth and sixth centuries, to show that this benediction, to which a certain peculiar efficacy appears to have been attributed, was a similitude of that given by The Almighty to our first parents: "*Fecit Deus . . . et benedixit eis, dicens crescite, &c. Hac ergo similitudine fit nunc in Ecclesia quod tunc factum est in Paradiso.*" In more modern times Jeremy Taylor seems to have had this figure present to his mind, though his application of it was different, when he wrote ("*Sermon on the Marriage Ring,*" vol. 4 of *Jeremy Taylor's Works*, ed. of 1848, p. 207):—"The first blessing God gave to man was society, and that society was a marriage, and that marriage was confederate by God himself, and hallowed by a blessing." His similitude for marriage is the spiritual union of Christ with his

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Church; and he says, not that it ought to be *per presbyterum, &c.*, but that it ought to begin and end "*in Christo et in Ecclesia.*"

Pothier goes on to show that these religious ceremonies were, before the sixteenth century, regarded in the light of pious usages of high importance, but not as essential to a valid marriage; and that, even when regarded as a Sacrament, marriage was held to be complete by the contract of the parties, without the intervention of a priest:—"Non seulement la benediction nuptiale, quoique pratiquée dans l'Eglise, n'était pas nécessaire pour que le contrat de mariage fut valable comme contrat civil, mais encore elle n'était pas plus nécessaire pour qu'il fut Sacrement"—(6 *Pothier*, s. 45, p. 154.) The same doctrine is repeated at pp. 157; 160, where he also shows that to have been the doctrine of the Council of Trent itself as to past marriages.

We forbear from citing other authorities, which can be consulted with equal advantage, in the work of *Pothier*; but there is one, remarkable for its especial reference to England, and, as *Pothier* cites it, to marriages in England, and, from its date, two centuries after the law of Edmund, and before there was time to forget its existence, which ought not to be omitted. It is the Decretal of Alexander the Third, who was Pope A.D. 1159 to 1181, to the Bishop of Norwich, as follows:—"Ex tuis litteris intelleximus virum quemdam et mulierem sese invicem recepisse, nullo sacerdote presente, nec adhibita solemnitate quam solet Anglicana Ecclesia exhibere, et aliam prædictam mulierem ante carnalem commixtionem solemniter duxisse et cognovisse; tuæ prudentiæ duximus respondendum quod, si prius vir et mulier ipsa, de præsentis se receperint, dicendo unus alteri, ego te recipio in meum, et ego te recipio in meum: etiamsi non intervenerit illa solemnitas, nec vir mulierem carnaliter cognoverit, mulier ipsa primo debet restitui, quum nec potuerit nec debuerit post talem consensum alii nubere."

Even if there were no witnesses present at such a marriage, that created a difficulty of proof only, and did not affect its validity. Upon this *Pothier* is express; and he refers to the authority of the same Pope, to be found in the *Corpus Juris Canonici, Decretal*,

Greg. 9, lib. 4, tit. 3, c. 2 :—"Quod nobis ex tua parte significatum est, ut de clandestinis matrimoniis dispensare deberemus, non videmus, quæ dispensatio super his sit adhibenda. Si enim matrimonia ita occulte contrahuntur, quod exinde legitima probatio non appareat; qui ea contrahunt, ab Ecclesia non sunt aliquatenus compellendi. Verum si personæ contrahentium hoc voluerint publicare, nisi rationabilis et legitima causa præpediat, ab Ecclesia recipienda sunt et comprobanda, *tanquam a principio in Ecclesiæ conspectu contracta.*"

Whilst, however, it was thought unnecessary, and, perhaps, at first incompetent for the Church to nullify the effect of that which, in the view of a lawyer, was marriage, and for centuries in that of the Church herself a Sacrament, though irregularly celebrated, yet the practice of clandestine marriages, that is to say, of marriages otherwise than by a priest in the presence of witnesses; was looked upon as odious. This idea, and the understanding of early times as to the part which the priest took in the performance of the ceremony, even when his presence was not absolutely essential, are well expressed in a work of great research, *Martene de Antiquis Ecclesiæ Ritibus*, vol. 2, c. 9, art. 2 :—"De ritibus ad Sacramentum matrimonii pertinentibus." "Ex his patet Ecclesiam etsi quandoque toleraverit clandestina nunquam approbasse matrimonia, sed quæ publice in facie Ecclesiæ coram testibus *confirmante pastore* celebrarentur."

The same writer, in another place, vol. 2, c. 2, art. 3, gives an account of the ceremony of marriage in ancient times, before there was any established ritual or usual form of words; and this passage throws light both upon the question what was the theory of marriage celebrated in the presence of a priest, and upon what was at first considered to be the essential element in such a ceremony. After minutely describing the espousals, which, as your Lordships are aware, were quite distinct from, and formerly often preceded the marriage by a considerable interval, and at which, in the form referred to by *Martene*, the ring was given, he proceeds :—"Consti- tuto ad celebrandas nuptias die adveniente sponsus et sponsa benedicendi, a parentibus aut paranympo, qui, ait S. Augus-

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"tinus (*Sermo* 293), erat amicus interior conscius secreti cubicularis, sistebantur sacerdotes ad portas ecclesiarum, qui secundum quosdam eos interrogare debebat de fide quam profitebantur. "Deinde datis sibi mutuo dextris *exigebat ab utrisque consensum*, "in quo totam Sacramenti matrimonii essentiam reponebant antiqui. "Inaudita quippe inter eos erant illa verba parochi: 'Ego vos conjungo in nomine Patris,' &c., in quibus aliqui ex recentioribus "scholasticis formam hujus Sacramenti constituunt, quæ tamen "desiderantur in duobus antiquis Ritualibus . . . et in aliis pene "omnibus quæ a nobis postea exhibebuntur. Quibus adjungere "possemus Constitutiones Richardi Episcopi Sarum, anno 1217, "editas, c. 56, in quibus hæc lego: Item precipimus quod sacerdotes doceant personas contrahentes hanc formam verborum in "Gallico vel in Anglico: 'Ego N accipio te M in meam.' Similiter et mulier dicat: 'Ego accipio te in meum.' In his enim verbis "consistit vis magna et matrimonium contrahitur."

The Constitution of Lanfranc (A.D. 1076), referred to in *Regina v. Mills*, laid stress upon the benediction only. We must, however, observe that if this constitution, which of itself could not make or alter the law, and was in fact but the epitome of an old decretal,* is to be read as pointing out the actual repetition of a blessing to be for civil purposes essential to matrimony, it can, in our opinion, no more be considered as having been adopted into the law, or retained as part of it, when Lord Hardwicke's Act passed, than other such constitutions, which, like that of Durham (*post*), required the presence of three or four several witnesses. For more respecting the nuptial benediction, its origin, when it was pronounced, and when not, and the religious duty of receiving it before the consummation of the marriage, we must refer to *Selden, Uxor Ebraica*, book 2, c. 28, vol. 2, column 687, *et seq.*

The early history of Christian marriages seems, no doubt, to point to the explanation of the presence of a priest, in order to superadd a blessing to the civil contract; though publicity, and the presence of the congregation, also appear to have at all times been

* *Selden, Uxor Ebraica*, book 2, c. 28, 2 vol. of works, col. 690, Decretal of Gratianus.

considered important. It would be erroneous, however, to suppose that, even in times prior to those of King Edmund, a consideration for the religious character of the ceremony was the only motive for such legislation. There were other reasons which led in France to the enactment of secular laws, to which, we believe, attention has not been called, for the prevention of marriages within the prohibited degrees; an object which the law of Edmund, so much discussed in *Regina v. Millis*, also has expressly in view.

In those times, before the Council of Lateran, the prohibited decrees included numerous cases not now within them; and the strict enforcement of the law of the Church, as to marriages within certain limits of kindred and alliance, was repugnant to national habits (*see* Decretal, Gregor. 9, lib: 4, tit. 14, de Consanguinitate et Affinitate, and History of the Anglo-Saxon Church, vol. 2, p. 6). The prohibition at one time extended to the seventh degree; but it was found necessary, from time to time, considerably to limit its operation.

The law of Edmund, in the tenth century (1 *Ancient Laws*, p. 257), which we here state for the sake of comparing it side by side with the others of a similar kind, was passed at a time when an extraordinary degree of confidence was placed in the testimony of the clergy—when the “word” of a bishop ranked with that of the King, and could not be gainsayed—when the priest was a Thane, and his oath equal in value to those of 160 churls, whilst that of a deacon counted for but sixty—(*Sir F. Palgrave's Rise and Progress*, p. 164, and 2 *Kemble's Anglo-Saxons*, p. 432); when, moreover, the clergy were the lettered class, and there was some truth in the saying, “Nullus clericus nisi causidicus.” At that time, therefore, the presence of a Mass-priest was a pledge for the notoriety and certainty, and also for the legality, of what was done.

The law of Edmund, after describing the espousals and their effect, proceeds:—“8. At the nuptials, there shall be a Mass-priest by law, who shall, with God's blessing, bind their union, to all posterity.”

“9. Well is it also to be looked to that it be known that they,

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"through kinship, be not too nearly allied, lest that be afterwards divided which before was wrongfully joined."

To the same effect were the laws of Charleimagne (Emperor of the West, A.D. 800) and his successors, referred to by *Pothier*, part 4, c. 1, s. 3, "*Des Loix qui ont requis pour la Validite des Mariages, qu'ils fussent celebres en face de l'Eglise.*" From which it would appear that, whilst those laws were in operation, France, equally with England, furnished an exception to the general law of the Western Church.

The first which we cite is the 408th Capitulary, which applies not merely to a first marriage, at which only was the nuptial benediction given, but also to subsequent marriages, which were not considered worthy to be clothed with that blessing (6 *Pothier*, p. 155):—"Ne Christiani ex propinquitae sui sanguinis connubia ducant, nec sine benedictione sacerdotis cum virginibus nubere audeant, neque viduas absque suorum sacerdotum consensu et conniventia plebis ducere præsument." Upon which *Pothier* remarks:—"Ces capitulaires comprenant dans une meme defense les mariages entre parents, et ceux qui se contractent sans benediction nuptiale, ou au moins sans l'intervention du cure, il s'ensuit que cette defense etait faite a peine de nullite."

He cites other laws of a like character, all of which were passed for the purpose of preventing clandestine marriages. The most remarkable is Capitulary 179, book 7, where it is said:—"Sancitum est ut publice nuptiæ ab his qui nubere cupiunt, fiant, quia sæpe in nuptiis clam factis gravia peccata. Et hoc ne deinceps fiat, omnibus cavendum est, sed prius conveniendus est sacerdos in cujus parochia nuptiæ fieri debent, in Ecclesia coram populo, et ibi inquirere una cum populo ipse sacerdos debet, si ejus propinqua sit, an non. . . . Postquam ista omnia probata fuerint, et nihil impedierit, tunc, si virgo fuerit, cum benedictione sacerdotis, sicut in Sacramentario continetur, et cum consilio multorum bonorum hominum, publice et non occulte ducenda est uxor."

These laws were not, it is true, without their peculiarities. *Martene*, vol. 1, p. 604, cites, as the reason for the law last referred to,

Capitulary 179, book 7 :—"Quia inquit est clandestinis conjugiiis
 "procreari solent cæci, claudi, gibbi et lippi, sive aliis turpibus
 "maculis aspersi." That reason, however, need not be understood
 as addressed altogether to superstitious fears, but as setting forth the
 evils believed to result from marriages between too near relations.

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Another of these secular laws, adopted from the Visigoths, imposed a fine of one hundred sous, or, in default of payment, the penalty of one hundred lashes, upon such Christians as should contract matrimony without the nuptial benediction.

The law of Capitulary 179, book 7, is stated by *Pothier* to have been adopted and incorporated in a decree of the Gallic Council, held A.D. 909.

It appears, therefore, that by this ancient legislation a valid marriage could only have been made with the assistance of a priest, whose duty it was, amongst others, to take care that the parties were not within the prohibited degrees, and not to marry them if they were, or if there appeared any other just impediment, "postquam ista omnia probata fuerint, et nihil impedierit."

Another place in which we find the same object avowed, and the duty of the priest plainly expressed, is in the decree of the Council of Lateran (twelfth century); by which, however, the performance of the duty was not enforced by annulling the marriage when it was neglected, or even when no priest was present to perform it; except, it should seem, in one class of cases, namely, that of persons within the degrees in which marriage was prohibited by the Church, subject to dispensation, those being more extensive than the degrees in Leviticus. In such cases, the Council of Lateran contemplated that persons ignorant of such impediment might become man and wife, by contracting marriage *in facie Ecclesiæ* through the intervention of a priest, though, without such a ceremony, their union would not have been marriage :—"Quum inhibitio copulæ conjugalis sit in
 "ultimis tribus gradibus revocata, eam in aliis volumus districtè
 "servari. Unde prædecessorum nostrorum vestigiis inhærendo, clan-
 "destina conjugia penitus inhibemus, prohibentes etiam, ne quis
 "sacerdos talibus interesse præsumat. Quare specialem quorundam
 "locorum consuetudinem ad alia generaliter prorogando statuimus

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"ut, quum matrimonia fuerint contrahenda, in ecclesiis per presbyteros publice proponantur, competenti termino præfinito, ut infra illum, qui voluerit et valuerit, legitimum impedimentum opponat, et ipsi presbyteri nihilominus investigent utrum aliquod impedimentum obsistat. Quum autem apparuerit probabilis conjectura contra copulam contrahendam; contractus interdicatur expresse, donec, quid fieri debeat super eo, manifestis constiterit documentis. 1.—Si quis vero hujusmodi clandestina vel interdicta conjugia inire præsumperit in gradu prohibito, etiam ignoranter, soboles de tali conjunctione suscepta prorsus illegitima censeatur, de parentum ignorantia nullum habitura subidium, quum illi taliter contrahendo non expertes scientiæ, vel saltem affectatores ignorantie videantur. Pari modo proles illegitima censeatur, si ambo parentes, impedimentum scientes legitimum, præter omne interdictum, etiam in conspectu Ecclesiæ contrahere præsumperint."

It is clear, therefore, that in this, as in the earlier laws to which we have called attention, one object of the presence of the clergyman was to prevent marriages within the prohibited degrees; and, accordingly, that a duty was imposed upon him, if present, to prohibit, and, so far as in him lay, to prevent such marriages.

The same object was one of those contemplated in the Constitution of Richard de Marisco, Bishop of Durham, and Lord Chancellor, A.D. 1217 (1 *Wilkins' Concilia*, pp. 581, 582), which contains the substance of the present Rubric. The first article upon this subject, headed "De Matrimonio Contrahendo," sets forth the dignity and advantage of marriage as "Sacramentum Christi et Ecclesiæ." The next, "Ne Matrimonia Contrahantur in Tabernis," provides for its decent celebration, "cum honore et cum reverentia, et non cum risu, non joco, non in tabernis, potationibusve publicis, seu commestationibus. Ne quisquam annulum de junco vel quacunque vili materia, vel pretiosa jocanda manibus innectat muliercularum, ut liberius cum eis fornicetur; ne dum se jocari putat honoribus matrimonialibus se abstringat. Nec de cætero alicui fides detur de matrimonio contrahendo, nisi coram sacerdote, et tribus vel quatuor personis fide dignis, propter hoc convocatis, ita quod nullatenus per verba de præsentibus contrahant nec post matrimonium per verba de futuro

"contractum carnaliter commisceantur, nisi rite canonicis denunciationibus præmissis, tam ubi mas quam ubi fœmina retro conversati sunt." Persons violating this article were to be punished as disturbers of the peace of the Church; and it was directed to be openly read to the people every Sunday. The next article, "De Forma Matrimonio contrahendi," is in the same terms as the Constitution of Richard Poere, the Bishop of Salisbury, of the same date (1 *Wilkins' Concilia*, p. 599), mentioned in the passage of *Martene* already cited:—"Item præcipimus quod sacerdotes præcipiant et doceant personas contrahentes hanc formam verborum in Gallico vel Anglico, 'Ego accipio te, N, in meam;' similiter et mulier dicat, 'Ego accipio te, M, in meum.' In his enim verbis consistit vis magna et matrimonium contrahitur." It then directs that no priest shall marry any, "aliquas conjungere personas matrimonialiter," without banns being published three times, which was to be done gratuitously; that a priest should not marry unknown persons, "nisi prius ei legitime constiterit quod personæ legitime sint contrahendæ;" and, if one of them were unknown, then not without letters testimonial, certifying that such person could lawfully marry, and that banns had been published in his or her parish. The article at the foot of the same page (p. 582), "ne matrimonio sine termino præfinito contrahantur," contains the substance, almost in the words of that part of the decree of the Council of Lateran already stated, beginning at the words "quum matrimonia."

These constitutions serve to show the very origin of the ancient services out of which that in the Prayer-book was mainly composed. We need do no more than refer to the subsequent constitutions to the like effect, collected in *Lyndwood*, p. 271, *et seq.*

Before we proceed to a consideration of the Rubric, it will be convenient to inquire whether any light is thrown upon the subject by the decree of the Council of Trent, to which we must direct particular attention, because of so much reliance having been placed upon it by Dr. *Gayer*, in his able argument for the plaintiff.

The "Decretum de Reformatione Matrimonii" was passed at the 24th session of that Council, held in 1563; and it was carried against the opinion of fifty-six prelates, who held that the Church

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had no power to nullify the effect of a Sacrament. The decree is prefaced by a statement of the nature of matrimony, according to the views of the Roman Catholic Church, and by twelve canons respecting marriage, divorce and celibacy, and the power and exclusive jurisdiction of the Church concerning them. The decree itself commences by stating as indubitable that clandestine marriages made with the free consent of the parties are valid both in law, and also, it should seem, as Sacrament, "*rata et vera esse matrimonio*" (6 *Pothier*, p. 157), so long as the Church does not hold them to be null; and it anathematizes those who assert the nullity of such marriages, or of marriages of children without the consent of their parents; stating, nevertheless, that Holy Church had always, for the best reasons, detested and prohibited such unions. It goes on to recite the inefficiency of former prohibitions, and the evils which had arisen from allowing of marriages contracted by the mere consent of the parties; especially that husbands had left their first wives, with whom they had secretly contracted marriage, of which there was no evidence forthcoming, and then publicly married others, with whom they lived in perpetual adultery: "*Cui malo quum ab Ecclesia, quæ de occultis non judicat, succurri non possit, nisi efficacius aliquod remedium adhibeatur, idcirco,*" &c.

The decree goes on to direct (*præcipit*), that for the future, before any marriage is contracted (*contrahatur*), banns shall be published on three continuous Feast days, in church, during Divine Service; which having been done, "*Si nullum legitimum opponatur impedimentum, ad celebrationem matrimonii in facie Ecclesiæ procedatur, ubi parochus, viro et muliere interrogatis, et eorum mutuo consensu intellecto, vel dicat, 'Ego vos in matrimonium conjungo in nomine Patris, et Filii, et Spiritus Sancti,' vel aliis utatur verbis, juxta receptum uniuscujusque provincie ritum.*"

It then provides that in case there is probable cause to suspect that the banns may be maliciously forbidden, then they shall be published but once:—"Vel saltem parochus et duobus vel tribus testibus presentibus matrimonium celebretur." In such case, the banns are directed to be published before the consummation of the marriage, unless the ordinary, in his discretion, dispense with

them; in other words, unless the marriage be by licence. Then follow the operative words of the decree, by which marriages are declared to be null, unless the conditions therein specified be complied with; which conditions being satisfied, a marriage is by construction valid, notwithstanding that in other respects the decree may be disregarded: "Qui aliter, quam præsente parochus, vel alio sacerdote de ipsius parochi seu ordinarii licentia, et duobus vel tribus testibus, matrimonium contrahere attentabunt eos sancta synodus ad sic contrahendum omnino inhabiles reddit, et hujusmodi contractus irritos et nullos esse decernit prout eos præsentis decreto irritos facit et annullat."

The decree then imposes penalties upon persons taking part in any such contract, where the clergyman and the proper number of witnesses are not present. It exhorts married persons not to cohabit before receiving the priestly benediction in church (*in templo*), which blessing only the parochus, or a person licensed thereto by him, or by the ordinary, is to give. It forbids the clergyman to marry persons without the consent of the parochus. It directs the keeping of a marriage register. It exhorts the parties, before they contract marriage, or at least three days before consummation, to confess and receive the Sacrament; and it earnestly recommends (*vehementer optat*) the continuance of the laudable customs and ceremonies then used in any province, in addition to those which are thereby prescribed. The chapter relating to this subject gives directions for its promulgation in each parish, and concludes by enacting that it shall come into force thirty days after such publication.

Upon the construction of this decree it has been holden, that, provided the marriage takes place *per verba de præsenti*, in the presence of the parochus and two witnesses, though the priest take no part in the ceremony, and even dissent from and reluct against it, the terms of the decree are satisfied, and the marriage is valid.

This is the result of the passages which are referred to in the argument from *Sanchez de Matrimoniis*, and *Zallinger's Institutiones Juris Ecclesiastici*.

To the same effect is the passage cited in argument and referred

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to, with approbation, in the judgment of the present LORD CHANCELLOR, in 10 *Clark & Fin.*, p. 753, which clearly expounds the scope and intention of the decree, and the office of the priest thereunder. “*Fernando Walter*, now a professor in the University of Bonn, in his *Treatise on the Canon Law*, a work highly esteemed on the Continent of Europe, speaking of the decree of the Council of Trent on this subject, says, the provision is new that both parties must declare their intention before their parochial minister, and, at least, two witnesses; this form is declared so essential, that without it the marriage is altogether void; but yet the object is only to secure a *trustworthy witness*, in order to the precise ascertainment of the marriage; wherefore the persons mentioned need not have been expressly invited to be present; nay, even the opposition of the parochial minister does not prevent the validity of the marriage, if he has merely heard the declaration. He goes on to explain the difference between a regular marriage before a priest, and a clandestine marriage without a priest, but considering them equally effectual. He says, ‘Marriage is a contract which ought, according to the ancient usage, to be confirmed by the priestly benediction; and properly this ought to be given by the proper parochial minister, or some one authorised by him, according to the rules of the Church. Other ceremonies are also to be observed. None of all this, however, is essential to the validity of the marriage.’ The decree of the Council of Trent, respecting the solemnisation of marriage, requires the presence of the parish priest, or some other priest specially appointed by him or the bishop; but even under this decree, the priest is present merely as a witness; it is not necessary that he should perform any religious service, or in any way join in the solemnity.”

This law was acted upon in *Herbert v. Herbert*.

Now we must observe that, although the decree of the Council of Trent, and the decisions upon its construction, are in no respect authority in this country, yet, so far as they proceeded upon any principle generally recognised in Christendom, we should be prepared to consider them with attention, as guides in any obscure and difficult case. So far, however, as the construction of that

decree by the canonists depends upon its form and language, such construction can here give us no assistance.

It appears to us, that the construction put upon the decree turned upon the terms of the nullifying words which we have already pointed out as being the key-stone of its enactments. Such construction could not have proceeded upon any doubt as to the power of the Church to make the prescribed ceremony, or the active intervention of the priest essential to the validity of a marriage, because the absolute control of the Church over that relation was laid down in the twelve canons immediately preceding the decree, even to the extent of enabling her, by canon 3, to create new prohibited degrees, and to dispense with such prohibitions, and, by canon 4, to constitute "impedimenta matrimonium dirimentia."

Moreover, we must observe that if the decree, and the authorities upon its construction, establish anything, it is that there must be three witnesses to a marriage, and that one of those witnesses must be the priest. If the Church of Rome were to-morrow to change her views as to the celibacy of the clergy, and to revoke the 9th canon of the Council of Trent, and the decrees of the Council of Lateran annulling the marriages of the clergy, the decree of the Council of Trent in other respects remaining in force, and the question were to arise, whether the priest could take a wife in the presence of two lay witnesses only, he himself acting the double part of husband and clerical witness, it might well be thought that the decree was not complied with; because it obviously contemplates three witnesses, one of whom is to be the parochus, or another priest appointed by him or the bishop. That case would nearly resemble the present. Those which have actually occurred, when attentively considered, do not appear to us to approach it.

This will still further appear when we call attention to what is equally relevant as the decree of the Council of Trent, namely, the legislation which took place in France soon after that Council, and the very different construction which that legislation received.

The laws of Charlemagne and his successors had at that time fallen into desuetude and oblivion (6 *Pothier*, p. 156), a state theoretically impossible in our more positive institutions. The

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decree of the Council of Trent, notwithstanding the efforts of the Pope and the clergy, was for political reasons not received into France. The example which it set was, however, soon followed there. The 40th article of the Ordonnance of Blois, in the time of *Hen. 3* (King of France, 1574 to 1589), enacts as follows:—

“Avons ordonne que nos sujets ne pourront valablement contracter mariage sans proclamations precedentes; apres lesquels bans, seront epouses publiquement; et pour temoigner de la forme, y assisteront quatre temoins dignes de foi, dont sera fait registre,” etc.

This was followed by an edict of *Hen. 4* (A.D. 1606), which declared that marriages which were not made and celebrated in the Church, and with the solemnities required by the Ordonnance of Blois, should be null and void. Then came the declaration of *Louis 13*, 1639, art. 1, which ordained that the Ordonnance of Blois should be strictly observed, and that in its interpretation it should be deemed that there must be four witnesses with the parish priest, who was to receive the consent of the parties and marry them “qui recevra le consentement des parties, et les conjoindra en mariage, suivant la forme pratiquee en l'Eglise.”

These laws were interpreted to mean, that the priest must not only have been present, but must have taken an active part, must have consented to marry and have married the parties, in order to make a valid marriage. “Cette presence du cure requise par nos lois pour la validite des mariages, n'est pas une presence purement passive; c'est un fait et un ministere du cure qui doit recevoir le consentement des parties, et leur donner la benediction nuptiale. Cela resulte des termes de la declaration de 1639, ci-dessus rapportee, ou il est dit que le cure recevra le consentement des parties, et les conjoindra en mariage, suivant la forme pratiquee en l'Eglise. Il ne suffirait donc pas, pour la validite du mariage, que les parties allassent trouver a l'Eglise leur cure, et qu'ils lui declarassent qu'ils se prennent pour mari et femme: il faut que le cure celebre le mariage.”

Pothier adds, in explanation of why the clergyman was not considered by the law of France a simple witness, but as having as

active duty to perform in marrying the parties (p. 353) :—" Ce que
 " nous avons dit, ' que le pretre qui celebre le mariage n'est pas un
 " simple temoin, et qu'il y exerce un ministere,' n'est pas contraire
 " a ce les theologiens enseignent, ' que les parties qui contractent
 " ' mariage sont elles-memes les ministres du Sacrament de
 " ' mariage.' Il est vrai qu'elles en sont de ce les ministres quant
 " a ce qui est de la substance, et qu'elles se l'administrent recipro-
 " quement par leur consentement, et la declaration exterieure
 " qu'elles se font de ce consentement; mais le pretre est, de son
 " cote, le ministre des solennitees que l'Eglise et le Prince ont
 " juge apropos d'ajouter au mariage pour sa validite, et il est
 " prepose par l'Eglise et par le Prince pour exercer ce ministere."

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Such was the state of the law of marriage in France up to the time of *Pothier*; and in this discussion it makes an equipoise with the Council of Trent.

It is not necessary that we should notice the more modern laws by which marriage is treated purely as a civil contract, and required to be in a prescribed form. The validity of a marriage under such laws must depend upon the express language of the legislator. We may, under this head, class the case in 1809, cited from the *Causes Celebres*, vol. 1, p. 295, and that referred to in the annotated edition of the *Code Civil*, by M. Gilbert, law 165, n. 11; from which we have not derived much assistance.

It remains to make some particular remarks upon our own law and practice. In doing so, it would be a useless task to pass in review the cases cited in argument, and all of which, with the exception of *Maxwell v. Maxwell* (a), A.D. 1832, and *Leggett v. O'Brien* (b), A.D. 1834, before a very learned Judge, the late Dr. Radcliffe, and *Jarrold v. Jarrold* (c), before Vice-Chancellor Wood (A.D. 1855), were stated, marshalled and criticised in the case of *Regina v. Millis*. A comparison of the judgment of Lord Lyndhurst and that of the present LORD CHANCELLOR will supply all that can be said on this part of the subject. With respect to those authorities, however weighty they may be, which, in *Regina v.*

(a) Milward, 290.

(b) Milward, 225.

(c) 16 Jur. 853.

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Millis, were, in the result, disregarded, it would be useless to cite them again. With respect to those which it left untouched, they may be considered as showing that, notwithstanding some early decisions, it came to be considered as law, that, before Lord Hardwicke's Act, a marriage might be valid, though it departed from the Rubric in respect of being celebrated in a private house instead of the church; with no witness other than the clergyman, instead of in the face of the congregation; with no person to give the bride away; without banns or a licence; without the use of a ring; without the repetition of the whole service; provided only that the parties took one another for man and wife by words in the present tense before a priest, or since the Reformation, for the reasons explained by Lord Lyndhurst in *Regina v. Millis*, a deacon. There is not, however, any authority in our law, of which we are aware, that if the clergyman refused to receive the consent, or allow of the marriage taking place in his presence, the parties could, in spite of him, take advantage of his being present to marry one another.

That was the link which the argument for the plaintiff below sought to supply, by urging that as all the duties imposed by law upon the clergyman might be neglected without invalidating the marriage, therefore the consideration that the proposed husband, as being an interested party, was not likely to perform those duties with impartiality or effect, was immaterial; and that the Rubric might also be disregarded or modified, in so far as it contemplates that the officiating clergyman shall be a third person.

This leads us to consider what is the essential part of the marriage service. It seems probable that the service in the Prayer-book is substantially the same as that which was in use for more than two centuries before the Reformation, so far as the end of the address to the people following the formula, "I, M, take thee N," &c., and, "I, N., take thee, M." &c. Whether any part of it was in use before the thirteenth century is a question upon which historians are not agreed.

Dr. *Lingard* (*Anglo-Saxon Church*, vol. 2, pp. 9, 10) states that in early times no form of words was used at the nuptials, and

that there was no express contract of marriage at the ceremony, of which he gives a detail (much to the effect of one of those in *Selden, Uxor Ebraica*, book 2, c. 27, without the words of the marriage ceremony); but that the consent of the parties was only signified by the giving and receiving of the ring at the church door, in the presence of the priest, who blessed it, and by afterwards attending in the church the celebration of the Eucharist, during which the nuptial benediction was pronounced. He states that there is no trace of any form of marriage contract in ancient sacramentaries previous to the close of the twelfth century; and that the earliest mention of any form is in the constitutions of the two English prelates already mentioned, Richard Poere or Poore, Bishop of Salisbury (A.D. 1217 to 1228), and Richard de Marisco, Bishop of Durham, during the same period.

Sir Francis Palgrave (Rise and Progress of the Constitution, part 2, p. 135), however, concludes from the peculiar language, rhythmical form, and general use of the *verba de presenti*, that they represent an Anglo-Saxon oath, in use before Christian times, as the civil ceremony of marriage, to which the Church has since added the blessing; and that "notwithstanding the labours of Augustine, it is to be suspected that the ancient wedding form is yet retained in our Ritual, where the wife is taken 'to have and 'to hold,' " &c.

The oldest known forms of the English marriage service, according to the uses of Salisbury and York, which agreed in substance but differed in detail, will be found at large in *Selden, Uxor Ebraica*, book 2, c. 27, 2nd vol. of works (3rd if bound in six vols.), column 676; and those parts of the Rituals from which the present service was composed, will be found in a convenient arrangement, side by side with it, in a modern work, 2 *Palmer's Origines Liturgicae*, p. 212. The double form of consent is explained by the fact that the early part of the service, from the preface or banns to where the woman says "I will," consists of the espousals, which formerly used to take place some time before the day of the solemnisation of the marriage. In the introductory part of the ceremony, the expression which in the Prayer-book stands

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thus, "Dearly beloved, we are gathered together here in the sight of God, and in the face of this congregation, to join," &c., stands in the ancient form, "coram Deo, angelis, et omnibus sanctis ejus, *in facie Ecclesiæ*, ad conjungendum," &c. This form of banns (banna) was to be spoken in the mother tongue, and it admonished, as in the present form, anyone who might know of cause or just impediment to declare it.

Then followed a similar admonition to the man and woman, the terms of which are remarkable, as even more distinctly than the present form, indicating the discretionary power in the minister to prevent an improper marriage:—"Also I charge you both, and "eyther be yourselfe as ye wyll answer before God at the Day of "Dome, that yf there be any thyng done pryvely or openly betwene "yourselfe, or that ye know any lawful lettyng why that ye may "not be wedded togyder at thys tyme, say it nowe, *or we do any "more to this matter.*"

Then follows a Rubric in the terms of that in the Prayer-book, directing that if anyone puts forward a just impediment, and gives security to prove it, "et ad hoc probandum cautionem præstiterit, differantur sponsalia, quousque rei veritas cognoscatur."

The questions are then put, to which the man and woman answer "I will," and so end the espousals.

The ancient form proceeds to direct that the woman be given away by her father or friends, and that her husband shall plight her his troth "per verba de præsentī," saying after the priest. The most remarkable difference between the intermediate and more modern forms of those "verba de præsentī" is in the substitution of the words "according to God's holy ordinance," for the words "if Holy Church it woll (or well) ordeyne." These latter words are considered by *Sir Francis Palgrave* to have been added in Christian times to the formula, which, in his opinion, claims a more remote antiquity.

This, the most significant portion of the marriage service, stood as follows in the ancient rituals:—"Deinde detur femina a patre "suo, vel ab amicis ejus. Vir eam recipiat in Dei fide, et sua ser- "vandam, sicut vovit coram sacerdote, et teneat eam per manum

"suam dexteram in manu sua dextera, et sic det fidem mulieri per
 "verba da præsenti, ita dicens docente sacerdote—'I, N, take the, M,
 "'to my wedded wyf, to have and to hold, fro this day forward [at
 "'bedde and at borde, for fairer for fouler,*] for bettere for wors,
 "'for richer for porere, in syknesse and in hele, till death us
 "'departe [if Holy Church it woll (or well) ordeyne†], and thereto
 "'I plight the my trouthe.' Manum retrahendo. Deinde dicat
 "mulier docente sacerdote, 'I, M, take the, N, to my wedded
 "'husbonde, to have and to hold fro this day forward, for better
 "'for wors, for richer for porere, in syknesse and in hele, to be
 "'bonere and buxom (biegsam, obedient), in bedde and at borde,
 "'tyll dethe us departe, if Holy Church it woll (or well) ordeyne,
 "'and thereto I plight the my trouthe.'"

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Then followed the giving of the ring, and the blessing thereof.

Anciently, up to this point, the marriage was celebrated at the door of the church, "ad ostium Ecclesiæ." The parties then entered the church, and, after the thanksgiving and prayer, the Eucharist was celebrated, and, the solemn benediction was given.

That part of the service in which the minister joins the right hands of the parties together, and says, "Those whom God hath joined together let no man put asunder," is ancient, and it is stated by Mr. *Palmer* to be perhaps peculiar to the Church of England. It is observable that the authors of this form appear to have carefully avoided the style "*Ego vos conjungo*," adopted at the Council of Trent.

The address to the people, which follows, contains an explanation of the preceding service, and points out the distinction between that which is essential and that which is only declaratory or formal; and with it we may conclude our citations from the Book of Common Prayer, "*Here the Minister shall say unto the People*" (of whom before 1754 there need have been none), forasmuch "as M and N have *consented together in holy wedlock*, and "have witnessed the same before God and this company, and "thereto have given and pledged their troth, either to other, "and have *declared* the same by giving and receiving of a ring

* York use.

† Not in York form.

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"[and of gold and silver], and by joining of hands, I *pronounce* "that they be man and wife together, in the name," &c.

This is almost word for word taken from the ancient Latin form, *Selden, Uxor Ebraica*, book 2, c. 27, vol. 2, column 683.

If it be our duty to answer a question raised during the argument, and to say at what part of the service the marriage is knit for civil purposes, we answer, in the words of the 39th section of *Littleton*, "after affiance and troth plighted between them." This period, before the solemn nuptial benediction which was afterwards pronounced inside the church, was that at which dower "*ad ostium Ecclesie*" might have been assigned; and according to the *Commentary, Co. Littleton*, 34 a, that could by the better opinion only have been assigned "after marriage solemnised." The subsequent giving of the ring, and joining of hands, and publication of the fact of marriage by the minister, are in their nature, and are stated to be, symbolical and declaratory of a marriage which has already taken place by the consent of the parties. The blessing is as of persons who have already consented together in wedlock, and anciently, as well in England as abroad, the nuptial benediction was given only at a first marriage: *Selden, ubi supra*, column 678. The rest of the service consists of thanksgiving, exhortation, and prayer.

Lest, however, there should by possibility any mischief result from our expressing this opinion, we must protest against its being supposed to be, in our view, either wise or right to leave out any part of the service.

The Rubric gives directions with reference to marriage by banns only, and therefore must be capable of modification to suit the case of marriage by licence. This may explain why those circumstances which were to accompany a marriage by banns, but which might be dispensed with in the case of a marriage by special licence, amongst others, celebration in a church by the minister of the parish, in the presence of the congregation, had, before the Marriage Act, come to be considered as non-essential, the want of a dispensation for such purpose having been, before Lord Hardwicke's Act, treated as an offence against the ordinary, and, therefore, only as an irregu-

larity. The want of a person to give away the bride is not visited by the Rubric or by the general law with any consequences. The omission of the giving of the ring, and the subsequent part of the ceremony, may, for reasons already given, be considered for civil purposes non-essential. An omission by the minister to give the proper warning would be his fault, and the Rubric does not profess to visit that upon the parties.

These considerations may explain in what manner, consistently with *Regina v. Millis*, the decisions and *dicta* as to the validity of irregular marriages, which have varied in those several respects from the prescribed and accustomed forms, may still be law, may still be considered as legitimate applications of the rule which seems to have pervaded the law of marriage, viz., that directions as to the manner, and even prohibition under a penalty other than nullity, do not necessarily imply nullity; a rule acted upon since *Regina v. Millis*, in *Catterall v. Catterall* (b)*.

The Rubric, explained and confirmed as it is, can, however, hardly mislead us as to the duties of the minister, who, it appears, must be present, or as to the character in which he attends; and it abundantly indicates that the duties are other than those of a mere bystander, and that the character in which the minister attends is not only that of a witness to the contract, but that of a functionary entrusted with the duty of preventing the marriage from taking place, if a just impediment be brought to his knowledge. The evidence of such an impediment is left to the knowledge of the minister himself, to the conscience of the parties, and to the unenforced interference of third persons. The parties are not made answerable for the performance of the minister's duty at the penalty of their marriage; but the duty exists, and its character is such that the person to perform it ought to be one other than either of the interested parties.

Had the case been *res nova*, we might have thought that the law of Edmund, the Rubric, and the other indications that by the

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(a) 1 Robertson, 580.

* In the report of this case in *Robertson*, a "not" seems to have been omitted by mistake, in the second page of the judgment, page 582, line 9.

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law of England a priest was to be present at a marriage, were but reflections of the general law of the Church, by which, from the earliest times, the intervention of a priest had been inculcated, and from time to time enforced by penalties, though never, before the Council of Trent, by nullifying the marriage at which no priest assisted.

That view was presented and considered in *Regina v. Millis*, and it raised a question worthy of all the zeal, learning, and genius which it called forth; but that view was not adopted in the result, and it is not competent for us to restore it. It is to be assumed, for the purpose of to-day, that England, from time immemorial, divided from the Church, held the presence of a priest to be essential. And whatever hardship such a law may, in the course of years, have wrought to dissenting bodies, and also to British subjects in the colonies and in foreign countries, where no priest could be procured, if the law was ever rightly held to apply under such circumstances,* as to which we say nothing, those hardships (now mitigated by numerous statutes passed before and since the decision in *Regina v. Millis*), were very unlikely to have been foreseen at the time when the law assumed to exist must have been established. It cannot with justice be said that, at that time, it was either an unintelligible or irrational law, nor that the objects which it had in view, namely, the prevention of unlawful marriages, and the preservation of evidence of those which should take place, besides the addition of a religious sanction to the duties which spring from the relation of man and wife, are either obscure or even less important at the present moment than they were ten centuries ago.

The law assumed to exist appears to us, for the reasons which we have stated, to require that, equally in the case of the clergy as of the laity, marriage in this country shall (in the absence of express statute) take place in the presence and with the assent of a clerk in Holy Orders, who must be a third person, and whose duty it is to prevent or put off the marriage if there be opposed a just impediment; and who, in case he allows of its proceeding, is

* Compare *Catherwood v. Calson* (13 Mees. & Wels. 264), *Catterall v. Simpson* (1 Rob. 304), and *Catterall v. Catterall* (Ibid 580).

then, in the primary sense of the word, to marry the parties, by receiving their mutual consent to become man and wife.

If just exception be made to the length at which we have stated our unanimous opinion, and the reasons upon which it is founded, our excuse must be looked for in the unaccustomed nature of the case, and the grave importance of the general subject; nor are we ashamed to own that our minds fluctuated during the discussion, and that we deliberated with more than ordinary anxiety and caution, before we felt constrained to be of opinion that the act of competent persons, who in fact contracted with one another to become man and wife, by a ceremony as binding upon them in conscience (with reverence be it spoken) as if an Archbishop had pronounced the blessing, was, for reasons which still affect the security of titles, and the peace of families, unavailing in point of law.

We, that is to say, my Brother BYLES and HILL, and myself, being the only Judges who were present during the whole of the argument, thus answer the question in the negative.

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APPENDIX.

YATES v. MEEHAN.

(Queen's Bench.)

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May 26.
June 1.

APPLICATION on behalf of the High Sheriff of the county of Galway, for the expenses incurred by him in taking and keeping possession of certain goods seized under a *fi. fa.*; together with his poundage. The claim for poundage was abandoned in the course of the argument. It appeared, from the affidavits, that the Sub-sheriff for the county of Galway seized the goods in question, under a writ of *fi. fa.*, upon the 24th of August 1859. On the 27th of August, the Sub-sheriff was served with a notice on behalf of one Mary Anne Meehan, claiming said goods, and cautioning him against proceeding with the sale of same. Upon the 31st of August, the Sub-sheriff caused a copy of this notice to be served upon the plaintiff's attorney, and required his answer as to whether he would proceed with such sale, or abandon the seizure. The plaintiff's attorney having given no reply to this notice, upon the 7th of October the usual summoning order, under the Interpleader Act, was obtained. The summoning order having been served upon said Mary Anne Meehan and the plaintiff's attorney, and the said Mary Anne Meehan and the plaintiff having appeared, in pursuance thereof, by an order, dated the 21st of October 1859, an interpleader issue was directed to try the right to said goods. This interpleader issue was not tried, an arrangement to that effect having been entered into by the parties. The expenses claimed by the Sheriff were set forth in a schedule thus:—

1859—Bailiff in charge of defendant's goods, from the 24th of August to the 21st of October, being 58 days, at 2s. 6d. per day	£7 5 0
Sheriff's poundage on the writ of <i>fieri facias</i> , amount £45. 1s. 1d., at 1s. 0d.	2 5 0
	£9 10 0

age fees, but also to such expenses.

The Sheriff is not entitled, upon an application by him for an interpleader order under the Interpleader Act, to the costs of such application; but if there be conflicting claims with respect to the property seized, and the contending parties, by persevering in their claims, render it necessary for the Court to interfere, and grant the Sheriff a summoning order under that Act, the jurisdiction of the Court, thereupon, attaches, and the costs of keeping and preserving the goods seized, incurred after, but not before, the making of the summoning order, are within the direction of the Court; the Sheriff, however, in applying for such costs, must satisfy the Court that, after seizure and notice of claim, he has proceeded, under the Interpleader Act, with due promptness.

The right of the Sheriff to poundage fees is created by statute, but did not exist at the Common Law.

The Sheriff is entitled, in every case of an execution under a writ of *fi. fa.*, to deduct his poundage fees out of the sum levied, even though there be no surplus beyond the amount of the execution.

In the case of an execution under a *fi. fa.*, where there is a surplus beyond the amount of the execution, if, with the assent of the defendant in the execution, expenses are incurred by the Sheriff, either for the preservation or for the more advantageous sale of the goods, he is entitled, not only to his pound-

T. T. 1860. Upon the writ of *fi. fa.* there was the following indorsement:—
Queen's Bench. “The defendant is a resident of Tuam, county Galway; has a soft
 YATES “goods shop; hawks goods through the country—SAMUEL MAT-
 v. “THEWS, attorney for the plaintiff.”
 MEEHAN.

Jordan, for the Sheriff, referred to *Butler v. Lloyd (a)*, and also to the indorsement upon the writ of *fi. fa.*

W. J. Sidney, for the claimant, Mary Anne Meehan, referred to *Dabbs v. Humphries (b)*; *Underden v. Burgess (c)*; *Scales v. Sargeson (d)*, and to the 10 *Car.*, sess. 3, c. 9.

FITZGERALD, J., referred to the 6 *Anne*, c. 7; the 43 *G.* 3, c. 46; the 106th General Order 1854, and the cases of *Moran v. Tyrrell (e)*, and *Buckle v. Bewes (f)*.

Cur. ad. vult.

LEFROY, C. J.

June 1.

In this case, in which an application has been made, on behalf of the Sheriff, for the expenses incurred in keeping certain goods seized by him, we have had to consider his right to such expenses, as also to consider the different questions which arose in the course of the argument, with a view to regulate the practice of the Court with respect to the Sheriff's title to demand his fees, or the expenses which may have been incurred by him in the taking care of goods seized under the execution of a writ of *feri facias*. We have carefully examined and fully considered the different statutes relating to this subject, both in England and Ireland; the 10 *Car.* 1, sess. 3, c. 19, in Ireland, the 29 *Eliz.*, c. 4, in England, and the 43 *G.* 3, c. 46 (*Ir.*), as also the late Interpleader Act, which gives the Sheriff a right to apply to this Court for an interpleader order. We have also looked into the several cases to which we were referred during the argument, and, after such examination of the statutes and authorities, we have been enabled to form an opinion as to the rights of the Sheriff in this case. In the case of *Savage v. Smith (g)*, in which, although the Court arrived at no decision upon the point, yet the practice of the Sheriff's officer taking levy money for the preservation of the goods, in addition to the poundage fees, notwith-

(a) 1 *Ir. Jur.* 37.

(b) 3 *Dowl. Pr. Cas.* 377; *S. C.*, 1 *Sc.* 325; 1 *Bing.*, *N. C.*, 412.

(c) 4 *Dowl. Pr. Cas.* 104.

(d) 3 *Dowl. Pr. Cas.* 707.

(e) 5 *Ir. Jur.* 148.

(f) 3 *B. & Cr.* 688.

(g) 2 *W. Bl.* 1101, 1102.

standing the statute of *Eliz.*, was insisted upon. We have also considered attentively the case of *Woodgate v. Knatchbull* (a), in which reference is made to that practice, and a decision come to upon it; also the case of *Buckle v. Bewes* (b), and that of *Dew v. Parsons* (c); and from a consideration of these cases, and the statutes which I have mentioned, we have formed an opinion with respect to the rights of the Sheriff; first, with reference to the case simply of his fees; secondly, when he claims the expenses incurred by him for the preservation of the goods seized; and, thirdly, where an order under the Interpleader Act has been applied for by him, and granted by the Court, as to the rights which result from the granting of that order, and the manner in which the Court should deal with the case subsequently to the commencement of proceedings under that order. Referring then to the early statutes upon this subject, we are of opinion that the Sheriff is entitled only to his poundage fees—at the Common Law he was entitled to no compensation; he was bound to execute the Queen's writs, without making them the subject of any charge—those statutes, however, that of *Chas.* in Ireland, and that of *Eliz.* in England, for the first time, gave him a right to the fee of 1s. in the pound for the first £100 levied, and sixpence for every pound afterwards; but they forbade him, under the pretence or by virtue of his office, from taking or claiming anything more for the discharge of his duty; and, accordingly, in many of the cases we find that the question arose in an action against the Sheriff for extortion, for taking more than his poundage fees. It would seem to have been intended, and with reason, that, generally speaking, these fees should be allowed to the Sheriff in lieu of all the expenses and trouble attending the discharge of his duty in executing writs. In the case, however, of an execution under a *fieri facias*, where goods have been seized, and there is a surplus beyond the amount of the execution, if, with the assent of the defendant in the execution, expenses are incurred, either for the preservation of the goods, or for the more advantageous sale of them—as, for instance, the expense of employing an auctioneer to sell them—in that case the Sheriff is entitled not only to his poundage fees, but also to the expenses so incurred with the assent of the defendant. Where, too, expenses have been incurred by the Sheriff, owing to great default on the part of the plaintiff in the execution, in that case also, it would be reasonable to throw on the plaintiff those expenses in addition to his fees. But, with respect to his fees, the Sheriff is entitled, in every case, to

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(a) 2 T. R. 148.

(b) 3 B. & Cr. 688.

(c) 2 B. & Al. 562.

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deduct his fees out of the sum levied, even though there be no surplus; if there be a surplus, then, upon the execution of a *fiery facias*, he may deduct out of the surplus, in addition to his fees, any reasonable expenses properly incurred by him; as, for instance, in the preservation of the goods seized, or in the conducting of the sale of them in a manner most beneficial to all parties. These considerations dispose of the question as to the general rights of the Sheriff, apart from the case where an order under the Interpleader Act has been obtained by him. In such case the general rule is, that the Interpleader Statute being an enactment passed for the convenience and benefit of the Sheriff, his merely of his own motion coming to the Court, and applying to have the benefit of the Act extended to him, does not entitle him to any costs. If, however, there be conflicting claims with respect to the property seized, and the contending parties, by persevering in their claims, render it necessary that the Court should interpose at the instance of the Sheriff, and grant him a summoning order, the jurisdiction of the Court thereupon attaches, and the costs of these subsequent proceedings are within the direction of the Court. The question then arises, whether those costs include not only the Sheriff's poundage fees, but whether he is not also entitled to the expenses which he may have incurred in the preservation of the goods seized? a question of considerable importance, when we consider how far the rights of the parties may be affected by delay on the part of the Sheriff. We hold it to be essential, therefore, when the Sheriff, after having obtained an order under the Act, applies for the costs and charges of preserving the goods seized, that he should make it appear to the Court that he has come with due diligence; for by this order he is not to be permitted, after having executed the writ and made a seizure, to incumber the parties with the expenses of detaining the goods, without giving them an opportunity, at the earliest period he could reasonably be expected to do so, of determining whether they would persevere in their claims, so as to render necessary the granting of the order under the Interpleader Act. These are the principles upon which, it appears to us, this case should be decided; the Sheriff has not used due diligence in applying for the order under the Act; and, by that negligence, he has disentitled himself from obtaining any order of the Court with respect to the expenses claimed by him upon the present motion.

O'BRIEN, J.

I concur in the ruling pronounced by my LORD CHIEF JUSTICE, that this application on the part of the Sheriff should be refused,

upon the ground of delay. I arrive at this conclusion without deciding whether the exceptional cases put by my LORD CHIEF JUSTICE may not create a distinction. In the absence, however, of such exceptional cases, the Sheriff is only entitled to the poundage fees allowed him by the statute.

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HAYES, J.

I concur with my Lord, that this case ought to be decided upon the ground that due diligence has not been used on the part of the Sheriff. It is only necessary to look at the dates, to be convinced not only of the absence of due diligence, but of the existence of very great laches on the part of that officer. The goods were seized upon the 24th of August 1859; the claim by the defendant was made upon the 27th of August, and upon the 31st of August the Sheriff serves notice of that claim on the plaintiff. Now, the first exhibition of laches on the part of the Sheriff is that, instead of bringing the matter at once before the Court, he, by the notice, gives the plaintiff a week to consider as to what course he should adopt. The levy having been made, to a comparatively small amount, on the goods of a country shopkeeper, no step is taken during that week by the Sheriff, to bring the case before a Judge in Chamber, to get his order under the Interpleader Act; for, it must be borne in mind, that it is by no means necessary to defer such an application until a Judge would be sitting in the Consolidated Chamber; such a proceeding under this Interpleader Act might be instituted before a Judge even at his own house. Here, however, the application is not even made at the end of the week; but several Consolidated Chamber Sittings are passed by, and it is not until the 7th of October that the summoning order is obtained; during all that period the Sheriff's bailiffs are keeping watch, night and day, on this miserable stock of soft goods. At length, after being served with the summoning order, the execution creditor finds that it is not worth his while to proceed with the execution, declines to try the issue, and so abandons all claim to the property. The Sheriff now comes here, claiming the sum of £7. 5s. for watching the goods during the Long Vacation, and £2. 5s. as his poundage fees. This statement of facts and figures is of itself sufficient to show the unreasonableness of the Sheriff's claim. It is the duty of the Sheriff to apply for an order, under the Interpleader Act, with promptness, after seizure and notice of claim. Were authority wanted for that position, the case of *Wrixon v. Purcell* (a) lays it down in so many words. The

(a) Bl. Dun. & Osb. 235.

T. T. 1860. Sheriff, therefore, having forborne to bring the matter before the *Queen's Bench*. Court at an early opportunity, he has, in my opinion, forfeited all claim to the consideration of the Court.

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FITZGERALD, J.

This case is one of considerable practical importance, and, for that reason, I am desirous of stating in a few words the grounds for my concurrence in the judgment of the Court. This an application by the Sheriff, that John Yates, the execution creditor, "do pay to " the Sheriff the expenses incurred by said Sheriff, of taking and " keeping possession of the goods and chattels in the interpleader " order in this cause specified, together with his poundage." I quite concur in what has fallen from my LORD CHIEF JUSTICE, as to the Common Law position of the Sheriff; and I take it to be quite settled that, at the Common Law, the Sheriff was not entitled to make any charge for executing the Queen's writs. In *Dew v. Parsons* (a), I find a statement made by Abbott, C. J., which, although it was not the decision of the Court, yet, coming from so eminent a Judge, is a *dictum* entitled to great weight. He says (b), " At the " Common Law the Sheriff was not entitled to make any charge " for executing a writ; and, therefore, if he has any claim, it must " be under the provisions of some statute." The facts of this case are not such as would have entitled the Sheriff, either under the Irish statutes of *Charles* and *Anne*, or under the 43 G. 3, or 16 and 17 Vic., c. 113, to the amounts which he now claims in respect of the seizure and keeping of these goods in this particular case; and so we dispose of the question both as to his rights at Common Law and under these statutes. But this application is one under the Interpleader Act. That Act was passed for the ease and benefit of the Sheriff; so that, instead of his being subjected to an action of trover or trespass, or obliged to institute an interpleader suit in a Court of Equity, this Act enables him, by a summoning order, to bring the contending parties before the Court or a Judge, and to compel them to interplead. This motion is not for the costs of the summoning and interpleader orders, nor for expenses incurred after the interpleader order; but the Sheriff tries his hand in seeking to obtain the expenses incurred by him in the keeping of these goods, seized in August last, he not having obtained the summoning order until the 7th of October, nor the interpleader order until the 25th of October. The question is, could the Court, under any circumstances, give him those costs? The words of the Interpleader Act are:—" And the costs of all such proceedings shall be in the dis-

(a) 2 B. & AL 562.

(b) p. 566.

cretion of the Court, or any Judge thereof;" but then, "the costs" must mean the costs incurred from the time that the summoning order is pronounced. In a proper case, I should probably be of opinion that the Court had jurisdiction to award the Sheriff the costs and expenses incurred in keeping the goods seized, after, but not before, that order is made. If we are to decide this case on merits, I must say that the Sheriff has not any; he holds these goods from August until October, and then he asks for the expenses incurred by him in the keeping of the goods during that period—expenses which, in my opinion, have been principally incurred by his own delay in applying to the Court. I have no hesitation, therefore, in coming to the conclusion, that the present is not a case in which the Court should exercise its authority, if it had any, in giving these costs to the Sheriff.

T. T. 1860.
Queen's Bench.

YATES
v.
MEEHAN.

O'HANLON v. MURRAY.

June 4.

ACTION against an attorney, for negligence.—The summons and plaint stated that, on the 29th of March 1858, one John Phelan applied to the plaintiff to lend him a sum of £100, and proposed to assign to said plaintiff a deed of assignment of certain premises, together with the original title-deeds, to be held by the plaintiff as an equitable mortgage for securing the repayment of said sum of £100; to which application the plaintiff agreed to accede, on the conditions that said deed of assignment should be duly registered.—Averment, that the defendant, on the plaintiff so agreeing to accede to said application, he, said defendant, undertook and promised to act as plaintiff's attorney in carrying into effect said agreement and security, and as plaintiff's attorney to have said deed duly registered; and by writing under his hand, dated said 29th of March 1858, undertook, when same should be duly registered, to hand same to plaintiff, with the original deeds, to be held by plaintiff as an equitable

The summons and plaint stated that one P., having applied to plaintiff for the loan of £100, proposed to assign to him a deed of assignment of certain premises, together with the original title-deeds, to be held as an equitable mortgage for securing the repayment of said sum of £100; to which plaintiff acceded, on condition that said deed of assign-

ment should be duly registered.—Averment; that defendant undertook to act as plaintiff's attorney in carrying into effect said agreement, and to have said deed duly registered, and by writing undertook, when same should be duly registered, to hand same with the original deeds to plaintiff; that plaintiff lent the £100, but that defendant neglected to register said deed of assignment, or to hand said original deeds to plaintiff; by reason of which neglect, said P. assigned said deed of assignment to one K., whereby plaintiff lost the security on which he lent said £100, which said sum had been thereby totally lost to plaintiff. The defendant pleaded, *inter alia*, "that the assignment of said P. to said K. was caused by the acts, and done with the assent, of plaintiff himself." This defence set aside as embarrassing, as being neither a traverse, nor a plea in confession and avoidance of the entire cause of action.

T. T. 1860.

Queen's Bench.

O'HANLON

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mortgage, until said sum of £100 should be paid to plaintiff by said John Phelan.—Averment, that, relying on said promise and undertaking of defendant, he, said plaintiff, lent to said John Phelan said sum of £100, on the security aforesaid; yet that defendant, not regarding his duty as attorney of plaintiff, nor his undertaking, but intending wrongfully and unjustly to delay and injure plaintiff, and deprive him of said security for said sum of £100, did not, nor would, although often requested, have said deed duly or at all registered, but, on the contrary, neglected, &c., so to do, and to hand over to plaintiff said deed, with the original deeds; and otherwise so carelessly, negligently, &c., conducted himself, that said deed of assignment was not duly or at all registered, nor was it or the original deeds ever given over to plaintiff.—Further averment, that by reason of such neglect, carelessness, &c., on the part of defendant, said John Phelan was enabled to assign, and did assign, said deed of assignment to one Hugh Kavanagh, who, by virtue of said last-mentioned assignment, claimed to be entitled to said deeds, on the security of which plaintiff so lent said sum of £100; and that, by such carelessness, &c., of defendant, plaintiff had lost the security on which he lent said sum of £100, which sum of £100 had been thereby totally lost to plaintiff. The defendant, after demurring to the summons and plaint, on the ground that it disclosed no consideration for the alleged promise of the defendant, and traversing that he was plaintiff's attorney, and traversing the negligence and carelessness alleged, pleaded, lastly, "that the assignment by said Phelan to said Hugh Kavanagh was caused by the acts, and done with the assent, of plaintiff himself."

C. R. Barry (with him *C. Coates*) moved to set aside this last defence, as embarrassing, on the grounds that while it purported to be an answer to the entire cause of action, it was only a traverse of the special damage; and, also, that it did not confess or avoid any material averment in the summons and plaint. They contended that no issue could be joined upon this defence, so as to raise the material question in the case, which was the vice of the plea in *Custis v. Sandford* (a). Where the special damage is the subject-matter of the action, it is material then to traverse it; but when it is only, as here, inserted by way of aggravation, the traverse of it is improper.

T. Harris (with him *W. Ryan*), in support of the defence.—This

(a) 4 Ir. Com. Law Rep. 197.

defence being a complete answer to the action, it should have been demurred to, and, therefore, the present motion is misconceived. A party who himself contributes to the wrong complained of cannot maintain an action for that wrong: the judgment of the Court in *Gould v. Oliver* (a). Were the negligence alleged in the summons and plaint alone denied, the defendant would not be allowed at the trial to show that the assignment to Kavanagh was with the assent of the plaintiff.

T. T. 1860.
Queen's Bench.
O'HANLON
v.
MURRAY.

LEFROY, C. J.

This cannot be pleaded as a defence to the entire action. This defence is not a traverse of the special damage, but is in the nature of a plea of confession and avoidance, viz., that the plaintiff has suffered damage, but that the act by which he so suffered the damage was done by his own consent. Under the old system, a party might meet the complaint of special damage, by pleading circumstances which might mitigate it; but, under the present system, he must either expressly traverse the entire cause of action, or confess and avoid it. This defence does not comply with the requirements of the present system of pleading; we cannot, therefore, allow it to stand. We will, however, allow the defendant to plead in answer to the special damage.

Coates applied for the costs of the motion.

Per Curiam.

Let the plaintiff's costs be costs in the cause. The defendant to have no costs in any event.

(a) 1 Bing., N. C., 134, 142.

B. HUDSON v. T. ROGERS and R. ROGERS.

June 11.

THE plaintiff issued a replevin for goods seized by the defendants, serjeants-at-mace of the Court of Record of the borough of Cork. The summons and plaint stated that the defendants, at the dwelling-house, illegally seized and had detained from thence divers goods

In replevin for an illegal seizure of the plaintiff's goods and chattels, leave given, upon payment of

costs, to amend the summons and plaint, by introducing therein a prayer for the recovery of the goods and chattels in the summons and plaint mentioned.

T. T. 1860. and chattels the property of the plaintiff, to wit, five tables, &c.,
Queen's Bench. and claimed £300 damages.

HUDSON

v.

ROGERS.

W. Woodroffe applied for liberty to amend the summons and
 plaint, by introducing thereinto a prayer of judgment for the
 recovery of the goods and chattels in the summons and plaint
 mentioned.

James Greene, contra, contended that the summons and plaint
 as it stood was quite right; and that even if it were not so, there was
 nothing to amend by.

Per Curiam.

The plaintiff may amend his summons and plaint as he desires,
 upon payment of the costs of this motion.

JOHN WARREN, surviving partner of WM. FARIS, deceased,

v.

HUGH KING.

June 8.

A summons and plaint which alleged that F., on behalf of himself and the plaintiff, at the request of the defendant, bargained with the defendant to buy of him 100 tons of hay, at the price of £4 for each and every ton thereof, to be delivered by the said defendant to the said plaintiff and the said William Faris when sent for by them, and to be paid for by said plaintiff and said William Faris on delivery thereof; and in consideration thereof the said defendant undertook to deliver said 100 tons of hay when requested.

Averment:—That the plaintiff and the said William Faris in his lifetime were willing to accept said 100 tons of hay, and afterwards frequently requested said defendant to deliver to them the said 100 tons of hay, and were always willing to pay for such hay on delivery.

Breach:—That defendant did not deliver said 100 tons of hay, or any part thereof, though plaintiff and F. in his lifetime have been willing and offered to accept said 100 tons of hay.—*Held*, to be embarrassing; leave given to the plaintiff to amend.

delivery. Breach:—That defendant did not, nor has he since, delivered said 100 tons of hay, or any part thereof, though the plaintiff and the said William Faris in his lifetime have been willing and offered to accept said 100 tons; whereby the plaintiff has been deprived, &c.

T. T. 1860.
Queen's Bench.

WARREN
v.
KING.

Carleton, for the motion.

The summons and plaint is embarrassing, inasmuch as in the single paragraph two contracts are stated, viz., one a contract to deliver the hay therein mentioned when sent for, the other to deliver upon request. It is also uncertain whether the contract is to deliver the hay when sent for, or to deliver upon request; if the contract be to deliver the hay when sent for, it is not averred or shown with certainty that the hay was ever sent for. Further, the contract is not stated with sufficient certainty to enable the defendant to traverse or deny it: section 70 Common Law Procedure Act 1853. Again, it is not averred or shown with certainty that said William Faris and the plaintiff were, or that either of them was, ready to pay for this hay on delivery thereof, or at all; nor is it shown that a reasonable time for the delivery of this hay had elapsed during the lifetime of the said William Faris, or before the commencement of the action; nor that the plaintiff, since the death of the said William Faris, was ready or willing or offered to accept the hay, or to pay for same on delivery or otherwise. Where two concurrent acts are to be done at the same time, the plaintiff must aver and show that he has performed all that lay upon him to do. *Rawson v. Johnson* (a) decides that, in an action for the non-delivery of goods, which the defendant had undertaken to deliver on request, it is necessary for the plaintiff to aver such request, and that he was *ready* and willing to receive the goods and pay for them, though it is not necessary to aver an actual tender of the price. In order to answer this summons and plaint completely, it would be necessary for the defendant to apply to the Court for liberty to plead a great number of defences, those allowed by section 58 of the Common Law Procedure Act 1853 to be pleaded, without these, being quite insufficient.

Brooke (with him *Blackham*), contra.

LEFROY, C. J.

This summons and plaint is certainly embarrassing; we will, however, give the plaintiff liberty to amend as he may be advised; the costs of this motion to be costs in the cause.

(a) 1 East, 203.

M. T. 1860.
Common Pleas.

BLACKBURNE v. STRATTON.

(*Common Pleas.*)

Nov. 15.

A writ of *fi. fa.* was directed to the Sheriff of D. The following direction was indorsed upon the writ:—
 "Defendant's goods is at 3 Castle-Forbes, city of Dublin, which I require you to seize;" signed by the plaintiff's attorney. The Sheriff having represented that there was no such place, the words "East Sheriff-street" were afterwards interlined. The Sheriff, having ascertained that the direction, so amended, did not denote the defendant's residence, and having heard that she resided elsewhere, made inquiry, and was informed that the furniture in the latter place did not belong to her. He then applied to the plaintiff's attorney for further directions, which were refused, and he was peremptorily required to execute and return the writ. The return of the writ having expired, a rule to return same was entered against the Sheriff.
 —*Held*, on motion to set aside the above rule, that inasmuch as the plaintiff's attorney had voluntarily undertaken to point out the defendant's goods to the Sheriff, and had given him information calculated to mislead, the Court would not subject the Sheriff to the risk of an action for a false return, by requiring him to return the writ, and they accordingly set aside the rule.

that she was the owner, and had let same to a gentleman named Stratton, and was shown by her an agreement in writing, purporting to set forth that Mr. Stratton was the tenant; and he also heard that the furniture did not belong to the defendant. Thereupon he returned to the Sheriff's office, 22 Upper Ormond-quay, and, meeting there Mr. Parsons' clerk, he stated the above facts, and requested that he would give the Sheriff further instructions as to the goods of the defendant. The clerk promised to inform Mr. Parsons, but the latter gave no further information, and on the 6th of August served a notice on the Sub-sheriff, stating that he would hold him accountable for not having seized the goods at East-road. The Sheriff, in reply, called upon Mr. Parsons to amend the indorsement, and to find out the goods of the defendant, which Mr. Parsons, by a subsequent notice, declined doing. It was further sworn, that the plaintiff having been, on the 4th of August, informed by the officers of the circumstances, stated that he believed the furniture at East-road to be defendant's; whereupon they requested him to amend the indorsement, by directing the Sheriff to the said premises, and undertaking, on his so doing, to make an immediate seizure. The plaintiff promised thereon to go to his attorney, and have the indorsement rectified, but no such amendment was made. The affidavits also stated that they had acted *bona fide*, and without collusion.

M. T. 1860.
Common Pleas.
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The affidavit filed in answer admitted that since the lodgment of the writ the plaintiff had ascertained that the true description of the place where the furniture was lying is No. 3 East-road, Castle-Forbes, and at the opposite side of the road where Castle-Forbes is, which consists of but one house and ground adjoining; but that he had given the best description which he could at the time. The plaintiff, in his affidavit, further stated that, having heard that a quantity of the goods were removed from the house, on the morning of the 3rd, the object of his visit to the Sheriff's officers, on the 4th of August, was to inform them that he would hold them accountable for not having seized. The plaintiff also deposed that he had given the best description in his power. It appeared that the defendant had since petitioned the Insolvent Court. Messrs. Young and Groves, the officers, made an affidavit in reply, stating that there was no house which answered the description of 3 East-road, there being only two houses on the side of the road in which the house in question is situate; also that the house in East-road is nearly half a mile from Castle-Forbes.

R. Armstrong (with whom was *G. Ponder*), in support of the motion.
The indorsement on this writ did not comply with the 106th

M. T. 1860. General Order, which requires that "The place of abode and addition of the party against whom any writ of *capias ad satisfaciendum* or *fiery facias* shall issue, or such other description of him as the attorney for the plaintiff, or his agent, may be able to give, shall be indorsed on such writ; but this Rule being intended for the protection of the Sheriff, no defendant shall be allowed to take advantage of the want of such indorsement; and it shall not be necessary to state the place of abode or addition of either party in the body of such writ." Though this writ purported to bear such an indorsement, it was not according to the fact, and the plaintiff's attorney subsequently neglected to give the Sheriff the requisite information. The plaintiff undertook to point out the locality of the goods, and failed to do so; and it would be unreasonable to expose the Sheriff to an action for a false return of *nulla bona*, by compelling him to return this writ: *Clarke v. Palmer* (a); *Pallister v. Pallister* (b); *Knipe v. Patterson* (c); *Badman v. Pugh* (d).

Whiteside and *Coates*, contra.

The application here comes too late. The Sheriff ought to have made this application at an earlier period. The plaintiff's attorney gave the best information in his power, and there is nothing in this indorsement which absolves the Sheriff from his duty to seize the defendant's goods, wherever found in the bailiwick: *O'Rorke v. Kinsella* (e); *Constable v. Fothergill* (f); *Davies v. Watkins* (g); *Cox v. Tullock* (h).

Armstrong replied.

MONAHAN, C. J.

This case is not quite free from difficulty; but we are of opinion that we understand the facts sufficiently to enable us to dispose of it at once. The question is not whether the Sheriff, having received a writ of *fi. fa.* with a wrong description of the defendant's residence, can, on account of such mistake, refuse to return the writ; but the question is whether, having regard to what occurred between the plaintiff's attorney or his clerk and the Sheriff, the latter should be now exposed to an action, for not seizing the goods which the plaintiff alleges belonged to the defendant? It is quite

(a) 9 B. & C. 153.

(c) 5 Ir. Com. Law Rep. 181.

(e) 1 Ir. Com. Law Rep. 496.

(g) 2 Dowl., N. S., 930.

(b) 1 Chit. R. 614 n.

(d) 6 Sc. N.R. 161.

(f) 2 Dowl. Pr. Cas. 591.

(h) 1 Cr. & M. 531.

clear that, under the 106th General Order of 1854, the plaintiff or his attorney is not bound to specify or to point out the defendant's goods or property liable to the execution; all he is bound to do is to indorse on the writ of execution the address and residence of the defendant, or such other description of him as he may be able to give the Sheriff. If he does this, the law then casts on the Sheriff the obligation of using due and reasonable diligence for the purpose of ascertaining what property the defendant is possessed of, liable to the execution; but, instead of taking this course, the plaintiff's attorney sends the writ by his clerk to the Sheriff, without any indorsement as to the address or residence of the defendant, Mrs. Stratton; and, on the Sheriff pointing out the omission, he puts this indorsement on it:—"Defendant's goods are in No. 3 East Sheriff-street, Castle-Forbes, which I require you to seize." What is the fair meaning of this indorsement? I entertain no doubt but that it is a direction to seize the particular goods specified, and no other, and that the plaintiff could not be permitted to turn on the Sheriff and say, "there were other goods which you ought to have seized." The Sheriff, having thus received the writ, with this special direction, at once executes a warrant to his bailiff. The bailiff proceeds to the place pointed out by the indorsement, and finds that a mistake has been committed, and that there are no grounds for supposing that the goods in No. 3 Sheriff-street belong to the defendant in the execution; but he is informed that a Mr. Stratton has recently taken the house, or lodgings in the house, No. 3 East-road. The bailiff immediately communicates the information he has obtained to the Sheriff; and instantly the Sheriff communicates with the person who delivered him the writ, and who was all through acting for the plaintiff and his attorney, and asks him does he require him to seize the goods in the house No. 3 East-road? The clerk says he will go to Mr. Parsons, the plaintiff's attorney, for instructions. As I, a few moments since, asked what was the fair import of the special indorsement on the writ, so now I ask what is the fair import of this answer of the plaintiff's agent? It is clearly this, "I will let you know whether I require you to seize the goods in question, and, until I do, I do not require you to take any step in the matter." If the plaintiff or his attorney had in terms made this answer to the Sheriff, I may ask, could the plaintiff be tolerated in afterwards attempting to hold the Sheriff responsible for not seizing the goods in question? I think he could not; and, considering what occurred as equivalent to the case I have supposed, I am of opinion the same consequences must follow. It must be borne in mind that, in the present case, there are no grounds whatever for supposing that the

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Sheriff acted in collusion with the defendant in the execution. We see nothing in his conduct but a desire honestly and properly to discharge his public duty ; and an attempt on the part of the plaintiff and his attorney to render him responsible for a debt which, without any default of his, has been lost by the insolvency of the defendant. We, therefore, shall not enable the plaintiff to bring an action against the public officer, and shall, therefore, set aside the fine which has been entered ; but we think that the parties should abide their respective costs of this motion.

BALL and KEOGH, JJ., concurred.

CHRISTIAN, J.

This case strikes my mind as one not free from difficulty. The doubt which I entertain arises in respect of the form of the application, and not of the merits of the case, which are in conformity with the view taken by the rest of the Court. The application was to set aside the writ, as not complying with the General Order, which requires an indorsement of the place of the defendant's abode, &c. There was, however, upon this writ an indorsement, which purported to be a description of the abode, and was, on the face of it, sufficient. The Sheriff accepts it, and goes to the locality, where he afterwards finds that the place intended did not correspond with the description ; but he was, in consequence, led to a place which was the abode of the defendant in the writ. All doubt and difficulty on that head was removed by that information ; but the fact which removed one matter of doubt raised another, namely, whether the property there belonged to the defendant. The Sheriff thereon returned to the plaintiff for further information. If the matter had rested there, and the only question in the case were whose property the goods were, I should have thought that that question would have been more properly discussed in an action for a false return, than by setting aside this rule. But what impresses my mind, and leads me to concur with the judgment of the Court, is this, that the plaintiff here has taken upon himself to indicate to the Sheriff the particular goods ; and that the plaintiff having afterwards had the opportunity of pointing out others to the Sheriff, and having neglected so to do, we ought not to subject the Sheriff to the risk of a trial by a jury. We must take it that the only goods which existed anywhere in the bailiwick were the goods alleged to exist in the particular locality ; and it is not competent for us to suppose that there were goods anywhere else in the bailiwick. On these grounds only, I am of opinion that this rule should be set aside.

T. T. 1860.
Common Pleas

GRAHAM v. BRENNAN.

June 6.

JAMES S. GREENE moved that, inasmuch as the notice of trial served by the plaintiff was for the 7th day of May 1860, the said notice of trial should be set aside as irregular. The notice of trial was as follows:—"Take notice that this case being at issue "in Her Majesty's Court of Common Pleas in Ireland, the same "will receive a trial by Nisi Prius before the Right Honorable "Baron Fitzgerald, the Judge presiding in the Nisi Prius Court "during Term, or, in his absence, one of his Brethren Judges "presiding in the same Court, on Thursday the 7th day of May "1860, at the place called the Court of Nisi Prius, in the Four "Courts Dublin, between the hours of nine and ten o'clock in "the forenoon of said day. Dated this 25th day of May 1860. "Signed," &c., &c. Counsel contended that the notice in question was irregular and null, as the 7th of May was passed at the time the notice was served. He cited *Dumoulin v. Druitt* (a).

Where a notice of trial was served upon the 25th of May, for the trial of the cause before the Judge presiding in the Consolidated Nisi Prius Court during Term, on Thursday the 7th day of May 1860:—*Held*, that, inasmuch as the defendant must have known that the 7th of June was the day actually intended, the notice being correct in every other respect, it was sufficient, and a motion to set it aside was refused with costs.

Peet, contra.

The notice is sufficient, as it is not calculated to mislead. The day stated therein should be read as if the word "May" were omitted; and, as there is only one 7th of a month in the present Term, it must be referred to that date and no other. The defendant has made no affidavit stating that he has been misled. Had the objection been made at an earlier period, the plaintiff would have had an opportunity of withdrawing the present notice of trial, and serving notice for the After-sittings: *Browne v. Wildbore* (b). *Fenn v. Green* (c) is an authority in favour of the validity of this notice. There the introduction of the word "next" was held not to invalidate, as not calculated to mislead. A motion to set aside a notice of trial is unprecedented, the course of the defendant being not to appear at the trial.

Greene, in reply.

Dumoulin v. Druitt shows that it is open to the defendant to object to an informal notice of trial, by a motion to set it aside. That case also, in principle, governs the present; the notice should be free from ambiguity.—[MONAHAN, C. J. There the notice was clearly irregular; the defendant had not the proper notice before the

(a) 5 Ir. Jur., N. S., 168.

(b) 1 Sco. N. R. 159.

(c) 6 El. & Bl. 656.

T. T. 1860. *Common Pleas.* Nisi Prius day.—CHRISTIAN, J. Suppose that the notice were simply for Thursday the 7th — 1860, would it not be good?—
 GRAHAM
 v.
 BRENNAN. He referred to section 105 of the Common Law Procedure Amendment Act 1853.

MONAHAN, C. J.

We entertain no doubt that this was a good notice of trial. It is to be read as if it were a notice for an impossible day; and inasmuch as, according to the Rules of the Courts, there must be ten days of trial, anyone who got it had only to read it as, in effect, saying that the cause being at issue, a trial would take place during Term, before the Judge who is now presiding in the Nisi Prius Court, on Thursday the 7th. Now only one such day occurs after the 25th of May, namely, the 7th of June; therefore, though the day which the notice stated had already passed, we have no doubt that the notice was sufficient, and the present motion must therefore be refused with costs.

M. T. 1860.
 Nov. 17.

DEFRIES v. STEWART.

A defence to an action for a money demand, controverting the plaintiff's right to recover part of the demand, and, as to the residue, admitting the plaintiff's claim in respect thereof, and confessing the action to that extent, concluding with "and therefore he defends the action," will be set aside.

THIS was an application to set aside a defence as embarrassing. The summons claimed the sum of £54. 3s., for goods sold and delivered by the plaintiff to the defendant, and upon an account stated. The defendant pleaded, as to the sum of £25. 3s., that the plaintiff had undertaken to furnish to the defendant certain gas-burners, which were warranted to effect a saving of 35 per cent. in the consumption of gas; but that the said gas-burners did not effect any such saving as they were warranted to do, but, on the contrary, became, by reason of the said breach of warranty, wholly useless; whereupon the defendant, within a reasonable time, gave notice to the defendant that he had rescinded the contract, but that the plaintiff has refused to take back the goods.

The defence then proceeded thus:—"And as to the residue of the count for goods sold and delivered, the defendant admits the plaintiff's claim in respect thereof, and hereby confesses the plaintiff's action to that extent," concluding with the words "and, therefore, he defends the action."

Dillon moved to set aside the defence.

This plea is in distinct violation of the provisions of the 46th

General Order (1854); and the officer having refused to mark judgment, this motion is necessary.

M. T. 1860.
Common Pleas.

DEFRIES

v.

STEWART.

Falkiner, in support of the defence.

This form of defence has been approved of by the Lord Chief Baron, in *Dunsandle v. Finney* (a). His Lordship says (p. 175)—“Such a form of pleading, containing a confession of part of the plaintiff’s demand, and a defence as to the remainder, was very common among the old forms. A precedent is given for it in “3 *Chitty on Pleading*, p. 909 (1831).”—[MONAHAN, C. J. If we follow the judgment of the Lord Chief Baron, as reported in that case, we shall enable defendants to get rid of the obligation of paying money into Court in such cases.]—Unless a defendant plead payment into Court, he is not bound to make such payment; and he may prefer putting in a plea of confession, in case he is not in a position to pay money into Court. He may not have the money to pay. He also cited 1 *Arch. Prac.*, p. 260.

Dillon, in reply.

No authority has been cited except this *dictum* of the Lord Chief Baron, and the point raised upon the present motion did not arise in the present case.—[CHRISTIAN, J. It would be establishing quite a new practice to compel a plaintiff to proceed in his action, for the purpose of recovering a portion of his demand, at peril of costs.]

MONAHAN, C. J.

Notwithstanding the opinion expressed by the Lord Chief Baron, in the case referred to by Mr. *Falkiner*, an opinion for which we entertain the highest respect, we cannot allow this defence, as the result would be to alter the practice of the Court, and to render the payment of money into Court unnecessary in such cases. We must, therefore, grant the motion.

Motion granted.

M. T. 1860.
Queen's Bench

GRAHAM v. ANGELO and CUMMING.*

Nov. 2.

(*Queen's Bench*).

Leave granted to enter judgment on a bond and warrant of attorney executed more than ten years prior to the application.

F. M. DARLEY, on behalf of the plaintiff, the administratrix of E. K., moved for liberty to enter judgment on a bond, under the 94th General Order.

The affidavit stated that, on the 6th of May 1842, the defendants executed their joint and several bond and warrant of attorney for confessing judgment thereon to E. K., whose solicitor entered judgment (which has been duly registered and re-registered) against one of the defendants, but omitted to enter judgment against the other. The bond was a security collateral with a mortgage of even date, and affected legacies bequeathed to the two obligors, and charged on premises situate in the county of Kildare. The premises were sold under a decretal order made by the Court of Chancery; but the purchase-money proved inadequate to pay the mortgage and judgment debt, and a large sum still remains due to the plaintiff.

Motion granted.

* Before the Full Court.

THE QUEEN v. HUSSEY.

Nov. 9, 14.

When bail will not attend in the county in which a prisoner is confined, but will attend in Dublin, the Court will grant a writ of *habeas corpus* to bring up the prisoner, in order that the bail may be sworn in her presence.

MOTION for a writ of *habeas corpus*, to be directed to the governor of Tullamore gaol, to bring up the body of Hussey.

Dowse, for the motion.

The affidavit stated that the Assistant-Barrister for the King's County, at the last Quarter Sessions, ordered that the prisoner, on entering into her own recognizances, and procuring two sureties (to be approved of by the resident Magistrate of the King's County) to appear and take her trial at the next Quarter Sessions, should be allowed out of gaol. The prisoner could not procure sureties in the King's County, but procured two sureties in Dublin, who were approved of by the resident Magistrate for the King's County, but would not travel to Tullamore to be sworn before him in the prisoner's presence. The Police Magistrates in Dublin have refused to let the sureties be sworn before them in the absence of the prisoner, on the ground that they have not jurisdiction. The prisoner must, therefore, remain in gaol until the end of the ensuing Quarter Sessions, unless

the Court grants a writ to bring her up, and then the sureties can attend, and be sworn before the Court. M. T. 1860.
Queen's Bench.

The Court granted the motion.

THE QUEEN
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On this day, the governor of the gaol at Tullamore returned that, in obedience to the exigency of the writ, he had the body in Court. Nov. 14.
The two sureties being also in attendance, the necessary recognizance was entered into, and the prisoner allowed out of custody.

CRUICE v. CONNELL.

Nov. 10.

MOTION to set aside a plaint as embarrassing. The action was brought by the payee against the maker of a promissory note; and the plaint averred "that the defendant is indebted to the plaintiff in the sum of £13. 2s. 9d., for that the defendant, on the 25th day of July 1860, by his promissory note, now over-due, promised to pay to the plaintiff or order the sum of £45. 2s. 9d. on the 1st day of September then next; and there is now due on foot of the said note the said sum of £13. 2s. 9d., the particulars of which are indorsed hereon."

In an action on a promissory note for £45. 2s. 9d., the plaintiff claimed the sum of £13. 2s. 9d., but did not aver "that the defendant never paid the note." On motion made to set aside the plaint as embarrassing—*Held*, good.

"INDORSEMENT OF PARTICULARS.

"1860—Sept. 1st.

To amount of defendant's promissory note, due date				
in margin	£45 2 9
Credit by cash	32 0 0
Balance due				£13 2 9"

Curtis, for the motion.

The plaintiff must set forth in his plaint every fact necessary to enable him to maintain the action. The averment that the defendant never paid the note is essential to the maintenance of the action: *Chit. Pl.*, p. 341. That the Common Law Procedure Act 1853 still requires the breach to be averred specifically is plain, because that averment forms part of the counts on bills of exchange and promissory notes, given in schedule C. Section 53 of that Act, no doubt, enacts that there is no error "so long as the substance is expressed without prolixity;" but the substance is not expressed in this plaint, since an essential averment has been omitted. The forms given in the schedule must be followed in matters of substance: *Stephenson v. Quin (a)*. The

(a) 7 Ir. Com. Law Rep. 314.

M. T. 1860. *Queen's Bench* *CRUICE* *v.* *CONNELL.* *plaint is not demurrable: Pepper v. Kelly (a). The indorsement is defective, no date being given: Neville v. Gollock (b).*

CRUICE
v.
CONNELL.

C. R. Barry, contra.

If the indorsement be defective, the proper course is to move that the defendant be directed to give further particulars: Common Law Procedure Act 1853, s. 46. The defendant has paid a portion of the debt; therefore, the plaintiff could not have adopted the precise form given in schedule C. Sections 53 and 241 of the Common Law Procedure Act 1853 show that this plaint is good, since the substance is expressed without prolixity; and the departure from the form given in schedule C is not calculated to mislead or prejudice the defendant in the *merits* of his case. The plaint in *Pepper v. Kelly* contained no averment that the money was due.

Cartis, in reply.

Nothing can be more embarrassing than the omission of an essential averment. The statement, "credit by cash, £32," in the indorsement, cannot cure the defect in the body of the plaint, which must be complete in itself: *Scott v. Anderson (c).*

LEFROY, C. J.

We are all of opinion that this plaint is not embarrassing; and that although the forms which are given in the schedule to the Common Law Procedure Act (Ireland) 1853 must in substance be lowed, there is in that Act a specific provision (section 241) enacting that an omission or departure from those forms shall not be fatal, "unless it is calculated to mislead or prejudice the opposite party in the merits of his case." Now, when a plaintiff suing on a promissory note states, at the outset, that the sum sued for is the sum afterwards claimed, and no intimation is given that he means to claim any further sum, is there any reason for saying that the omission of the averment "that the defendant never paid the sum," is embarrassing, and that this deviation from the ordinary form is a deviation in matter of substance? A party is not bound to adopt the precise form which is given in the schedule. Generally speaking, I still hold by the rule that a party must adopt those forms in all matters of substance. That rule had been departed from in the case of *Stephenson v. Quin*, which was cited during the argument. In that case, the plaintiff sued as executrix, but was not named as executrix throughout the entire body of the plaint,

(a) 5 Ir. Com. Law Rep. 317.

(b) 6 Ir. Jur. 232.

(c) 9 Ir. Jur. 422.

although she was named as executrix in the margin of the plaint. The plaintiff's title to sue rested on the averment that she sued as executrix; and, therefore, a mere statement of that title in the margin could not supply that necessary averment which had been omitted from the body of the plaint. This motion must, therefore, be refused.

M. T. 1860.
Queen's Bench
CRUCE
v.
CONNELL.

LONGFIELD v. CASHMAN.*

H. T. 1861.
Jan. 12.

ACTION to recover damages for injuries sustained from the diversion, by the defendant, of a stream and watercourse. The plaintiff also prayed that an injunction might issue, pursuant to the provisions of the Common Law Procedure Amendment Act (Ireland) 1856, to restrain the defendant, his agents, servants and workmen, from continuing the wrongful acts complained of, and from having, keeping or continuing the trenches, channels and cuts, on the side of the stream or watercourse in the plaint mentioned, or any of them, cut dug or made; and from permitting the banks of the said stream or watercourse to be ruinous or in bad condition for want of needful repairing; and from diverting the stream or watercourse respectively out of their usual course, or keeping them so diverted; and from repeating, doing or continuing any act whereby the water of the said stream, or any part of it, may be hindered from flowing in its usual and accustomed course, either to the dwelling-house of the plaintiff, or to the said other pieces or parcels of land of the plaintiff.

The plaintiff, in his affidavit, filed on the 23rd of November 1860, stated that he is owner in fee of the lands of C., in the county of Cork, and head-landlord of the adjoining lands of K., of part of which the defendant is tenant in possession; that a stream of water flows through the defendant's part of the lands of K. into the lands of C., and through them to the plaintiff's mansion-house, and has been used for irrigation, for supplying his mansion-house and premises with water, and for other purposes, by the owners of the lands of C.; that the stream has run through the same channel for upwards of one hundred years, and had been uninterruptedly used by the defendant for upwards of twenty-seven years, until the 9th of August 1860, when the defendant diverted the stream of water

Upon motion and affidavit of the plaintiff, stating that, unless the Court granted the writ of injunction prayed for in the plaint, he would sustain considerable loss before the action could be tried, the Court granted the writ, upon the terms that the plaintiff would speed the action, and, if the jury found for the defendant, would, if the Court so ordered, pay to the defendant any sum which the jury should award to him as compensation for the damages sustained by reason of the interference of the Court in granting the writ.

* O'BRIEN, J., *absente*.

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into another channel away from the mansion-house, whereby the plaintiff has been put to great inconvenience and considerable expense, and cannot irrigate his lands without the use of the stream; that this is the proper season for irrigation, which will terminate before the trial of the case in March 1861; and he will, unless aided by an injunction, lose the benefit of the irrigation; that the stream is the only means of supplying his deer-park with water; that while the defendant's father was in possession as tenant to the plaintiff, of part of the lands of C. (from which the defendant has since been ejected), the plaintiff obtained a license from him to change the water-cut on the lands of C., which then of right flowed through them, towards the plaintiff's deer-park; that the plaintiff made the alteration, but did not alter the course of the stream in the lands of K., or alter the passage of the water through the ditch which divides the lands of K. from the lands of C.

In the defendant's affidavit it was stated that the watercourse diverted by him had been made twelve years ago by the plaintiff, under a *parol* license given by the defendant's father; that the alteration commenced in the lands of K.; and that he had only restored the watercourse and banks to the condition in which they had been prior to the alteration made by the plaintiff.

Serjeant *Sullivan* and *Thomas Jones* moved the Court to grant the injunction prayed for. The injunction is necessary for the protection of the plaintiff's rights, because at this season the water is very valuable for irrigation, and the case will not be tried until the Spring Assizes. The defendant does not state that the water is valuable to him; but committed these injuries because the plaintiff ejected him from a part of the lands of C., after the determination of his lease. Therefore, this is one of the cases contemplated by the Common Law Procedure Amendment Act (Ireland) 1856, ss. 81, 82, 83, 84. The Court of Common Pleas granted an injunction under this Act, in the case of *Jones v. Pollock*.*

Jellett, contra.

This case does not come within the 83rd section of the Act cited, which contemplates only the case of a permanent injunction to be granted after a jury has ascertained the legal rights of the parties, and which will determine those rights finally and for ever. In the case of *Jones v. Pollock*, the rights of the parties had already been determined in an action. Neither does this case come under s. 84, which contemplates only an injunction granted by the Court of

* This case is not reported.

Chancery *ex parte* and until answer. The alteration made by the plaintiff was made under a *parol* licence, which is available to excuse a trespass only until countermanded: *Hewlins v. Shippam* (a). Courts of Law must act on the principles which govern Courts of Equity in granting injunctions. The plaintiff, therefore, cannot obtain an injunction until the verdict of a jury has established his legal right. That rule is followed whenever irreparable injury is not anticipated: *Wynstanley v. Lee* (b); *Motley v. Downman* (c); and the plaintiff has not made such a case.

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Jones, in reply.

The practice of Courts of Equity in granting injunctions is more liberal than would appear from the cases cited. Those Courts grant an injunction even where irreparable injury is not anticipated, until the party has established his right at Law, if great inconvenience would result to him from the withholding of it: *Eaton v. Jones* (d); *Heath v. Williams* (e). The Court must, in accordance with that principle, grant the injunction prayed for, until after the trial.

The Court made the following order, which was agreed to by Counsel on both sides:—

That the writ do issue and continue until the trial of the issue in the cause, and the further order of the Court, the plaintiff undertaking to speed the action; and, in case the jury shall give a verdict for the defendant, the jury to be at liberty, at the defendant's instance, to find whether the defendant be entitled to any and what compensation for damages sustained by reason of the interference of the Court, in granting the injunction, the plaintiff hereby undertaking to pay that sum in case the Court shall so order.

(a) 5 B. & Cr. 221.

(b) 2 Swanst. 333.

(c) 3 Myl. & Cr. 1.

(d) 4 Myl. & Cr. 233.

(e) 1 L. T., N. S., 267.

H. T. 1861.
Queen's Bench.

BROWNE v. REDMOND.

Jan. 21.

A defendant, sued under the Municipal Corporation Act (Ireland), for penalties for alleged acts of bribery, moved the Court to compel the plaintiff to give security for costs, and grounded his motion upon uncontradicted allegations that the plaintiff was a pauper—a clerk to his own attorney, wholly unconnected with the borough in which he alleged the acts to have been committed, and had no personal knowledge of them. The defendant denied explicitly that he was guilty of the acts alleged.—*Held*, that, in *qui tam* actions, the Court has jurisdiction, if the proceedings are collusive, to compel the plaintiff to give security for costs.

THIS was a motion to compel the plaintiff to give security for costs. The action was brought under the Municipal Corporation Act (Ireland) 3 & 4 Vic., c. 108, to recover eight several penalties incurred, as it was alleged, by the defendant, who being, on the 26th of November 1860, at an election held on that day in pursuance of the Act, a candidate for the office of Town-councillor for the borough of Waterford, offered to corrupt certain burgesses, by promises of money as a reward for their votes.

From the affidavits filed in support of the motion, it appeared that the plaintiff is not a citizen of Waterford, nor a burgess entitled to vote at any election for that borough; but is described in the plaint as residing "at North Cumberland-street, in the city of Dublin, gentleman," and is a clerk of Mr. Murray, the plaintiff's attorney, who is the town agent of Mr. Newport, an attorney residing in Waterford. E. S. Kenny, the brother-in-law of the defendant, was informed by the plaintiff's son, G. B., jun., that he the plaintiff's son knew nothing of the defendant, or of the parties to this action, or of Waterford; and, on the next day, the 10th of January 1861, the plaintiff's wife and daughter told E. S. K., when he called at the plaintiff's residence, that, "In consequence of the meeting between E. S. K. and G. B., jun., on the previous day, there took place between the plaintiff, his son and the other members of his family, a conversation, during which the plaintiff and his son expressed much surprise at the proceedings against the defendant, of the nature of which they were perfectly ignorant." They asked E. if the action was for debt, and stated that the plaintiff knew nothing of the defendant, and had no relatives in or connected with Waterford. The defendant stated his belief "That certain persons in Waterford, interested in the defeat of the defendant as a candidate at the municipal election mentioned in the plaint, and being actuated by motives of malice towards the defendant, and for the purpose of giving him annoyance, and putting him to expense, have subscribed sums of money to prosecute this action; and, in order to avoid all liability on their part to the costs thereof, have put forward, as the plaintiff, the said George Browne, who is a man of straw, and who, if there should be a verdict against him, will be altogether unable to pay the costs of the action, or any part thereof." The defendant further denied, in the most explicit terms, that he was either

directly or indirectly guilty of any of the acts mentioned in the
 plaint; and stated his belief that the plaintiff, not being in any
 manner connected with the city of Waterford (where the trans-
 actions were said to have arisen), or possessed of property therein,
 has not any personal knowledge of the several transactions alleged
 in the plaint.

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R. Armstrong (with him *Tandy*), in support of the motion, con-
 tended that the affidavits showed plainly that the plaintiff had no
 personal interest in the action; that he was merely put forward
 by certain parties, who did not wish to incur any personal risk;
 that the proceedings were so manifestly collusive that the Court
 ought to stay them until the plaintiff gave security for costs; and
 that the motion was not grounded on the fact of the plaintiff's
 poverty, but on the collusive nature of the proceedings: *Sheehy*
v. Dorman (a); *Rice v. The Dublin and Wicklow Railway Com-*
pany (b). It is well established that the Court has jurisdiction to
 compel a plaintiff to give security for costs in actions for penalties
 as well as in every other action: *M'Lester v. Quinn* (c). That was
 an action for penalties, under the Corrupt Practices Prevention Act
 (17 & 18 Vic., c. 102), which contains a special provision (section 24)
 giving to the Court or a Judge power to stay the proceedings in an
 action for penalties under that Act, unless the plaintiff gave security
 for costs; and the Court held that, by virtue of its inherent juris-
 diction, and independently of the 24th section of that Act, it had
 power to grant the motion.

T. Harris, and *W. Ryan*, contra, contended that no case could be
 cited in which the Court had, in a *qui tam* action, granted such an
 application, except the case of *M'Lester v. Quinn*, in which the Court
 acted under a special power given by the Corrupt Practices Preven-
 tion Act. If, prior to the passing of that Act, the Court had juris-
 diction in *qui tam* actions to grant such an application, there would
 have been no necessity to introduce a specific section into the Act
 to give the Court a power which it already possessed. Every appli-
 cation made in a *qui tam* action has been refused: *Foster v. Roun-*
dal (d); *Gregory v. Elridge* (e). Bayley, B., in refusing the motion
 in that case, stated, with great force, that "to require such security
 "would frequently render the Acts of Parliament giving the penal-
 "ties inoperative." Poverty on the part of the plaintiff is no ground

(a) 2 Fox & Sm. 238.

(b) 6 Ir. Com. Law Rep. 155.

(c) 10 Ir. Com. Law Rep. 358.

(d) W. W. & D. Rep. 58.

(e) 2 Cr. & M. 336.

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for granting the motion. It may be a hardship on the defendant that he has to contend with an opponent who will be no mark for costs, should the verdict be for the defendant; but the answer to that argument is, that the Legislature has given the right to bring the action; and the Court has no power to deprive the plaintiff of that right. .

Tandy, in reply, was stopped by the Court.

LEFROY, C. J.

This case has been argued as if it were really the case of a pauper bringing a *bona fide* action to assert his right, and that this was a motion to compel such a plaintiff to give security for costs. It is no such thing. A pauper may prosecute an action on his own behalf, without giving security for costs; but, if a pauper is set up as a plaintiff, as has been done in this case, to assert not his own right, but the right of a person who set him up, then he is liable to be compelled to give security for costs. That rule applies to cases of *qui tam* actions as well as to cases of ordinary actions; and it would be absurd that it should not apply to *qui tam* actions as well as to any other action. If a man sets up another to sue a third party, for the benefit not of the plaintiff, but of him who set the plaintiff in motion, what is the distinction between that case and an ordinary case? The man who set up the sham plaintiff may put him out of the way, if the action goes against him. He takes care that his own person shall not be liable; and the sham plaintiff is put out of the way; so that even his person cannot be made liable for the costs. The very principle which applies in an ordinary case upon which the Court acts, where a sham plaintiff is set up, applies equally here. The inconvenience and mischief are the same. The authorities which have been cited rest upon the ground of mere poverty not being alone a ground for compelling a plaintiff to give security for costs; and so, in the same way, a principle which applies to ordinary cases applies to a plaintiff in a *qui tam* action. Therefore, we are of opinion that this application should be granted; and if we had entertained any doubt upon the law, it would have been put an end to by the affidavits.

O'BRIEN, J.

We have been pressed with the cases of *Foster v. Roundal* and *Gregory v. Elridge*, as if we, in granting this motion, would decide that the poverty alone of the plaintiff is a ground for staying a *qui*

tam action. That is not so. Suppose the plaintiff to be a pauper, a beggarman from the street, who lives on charity from day to day—a Court of Justice is not, upon that single ground, to shelter the defendant by making the plaintiff give security for costs, if he brings the action to assert his own right. But to argue that the present case is of that nature is to forget its circumstances altogether. I recur again to the affidavits, which are not contradicted, and show that the plaintiff's wife was wholly ignorant of the action having been brought. It is said indeed that the plaintiff may have had some reason for not telling his wife of the matter. But we cannot act on such a supposition; and, upon the whole, it, is quite impossible to believe that this is a *bona fide* action brought by Browne in his own right. Neither he nor Mr. Murray, the attorney, have made an affidavit to resist the motion; and it is absurd to suppose that they would not have done so, if the action was brought *bona fide* by the plaintiff. For these reasons, I am of opinion that the motion should be granted.

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HAYES, J.

I should be very sorry if the Court were to hesitate an instant in disposing of this motion. A number of persons in the city of Waterford, who have not the manliness themselves to come forward, have employed an attorney to find a plaintiff to bring an action; and accordingly a person is discovered who does not appear to be in any way connected with the city of Waterford or its affairs; and, in the name of this person as plaintiff, an action has been brought, for the purpose of harrassing and worrying the defendant. I care not whether the defendant be innocent or be guilty. It is only fair that he should know the man whom he is to grapple with; and let him bring that man before the jury, and let them see him, and not a stalking-horse, as this plaintiff confessedly is. It appears to me that the persons who have employed this attorney, if not altogether guilty of the offences of conspiracy, maintenance and champerty, are very nearly so. The course also which has been taken by an attorney of this Court seems to me by no means creditable. We have been told that we have no precedent for granting this application. If that were so, I should be ashamed of the place in which we sit if we hesitated to make a precedent. But the cases cited on behalf of the plaintiff have no application. They are all cases in which it was sought to make the plaintiff give security for costs, because he was a pauper. Now a pauper plaintiff must have his Common Law right to sue, as well as any other subject of the realm. But no person has a right to put forward another to persecute his

H. T. 1861. neighbour, by a litigation in which he is ashamed to exhibit himself.
Queen's Bench We countervail no legal principle by granting this application ; and,
 BROWNE therefore, I am of opinion that the proceedings should be stayed
 v. until the plaintiff shall give security for costs.
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FITZGERALD, J.

I agree in the judgment pronounced by the other Members of the Court. We now decide, what in *M'Lester v. Quinn* (a) was only a strong expression of opinion by the Chief Justice of the Court of Common Pleas, that in this, as well as in every other case of collusive proceedings, where the action is really instituted by persons who conceal themselves, and put forward the plaintiff to protect them from liability to costs, this Court has authority to compel the plaintiff in a *qui tam* action, as well as in every other species of action, to give security for costs. In every case on motion heard upon affidavits which might be answered, and in which no affidavit has been made to contradict the statements of an opponent, we must take these statements to be correct, since they are not controverted or explained. It may be that the plaintiff was advised that it was not necessary to make answering affidavits. However that may be, we must take it that the defendant's affidavit states the case correctly ; and I agree with my learned Brother HAYES that this is a case of a number of persons who conspire to abuse this law, by employing an attorney in Dublin, who knew nothing of the case, and using the name of the attorney's clerk as plaintiff. This motion is only to restrain the party from proceeding until he has given security for costs. If the motion had been of another character, I do not say that the Court would not have been called on to restrain him from proceeding in the action at all.

Rule accordingly.

(a) *Ubi supra.*

E. T. 1861.

Exchequer.

COSTELLO v. WOODS.*

(Exchequer.)

April 16.

THIS was an application that the summons and plaint in this cause, as amended, might be set aside.

The defendant had demurred to the summons and plaint, and thereupon a consent, which was made a rule of Court by an order of the 12th of March, was entered into, "that the demurrer be allowed with costs, and that the plaintiff be at liberty to amend the said summons and plaint as he may be advised," on the terms of payment of costs. The plaintiff accordingly amended the summons and plaint in the particulars in which it was defective, and also changed the venue from the "county of Waterford," where it had been originally laid, to the "county of the city of Dublin."

Where a defendant demurred to a summons and plaint, and a consent was entered into that the plaintiff might be at liberty to amend as he might be advised"—*Held*, that the plaintiff might change the venue as originally laid.

C. Tandy, in support of the motion.

The order that the plaintiff might amend as he might be advised only permitted an amendment of the plaint in the particulars in which it was defective.—[PIGOT, C. B. Why did not you control them by the terms of your consent?—A change of venue is not an amendment. In *Evans v. Figgis* (a), the defendant demurred specially, and then the plaintiff moved for leave to change the venue, and also to amend. The Court refused the first branch of the motion. Doherty, C. J., says, "can change of venue be called an amendment?"—[PIGOT, C. B. The only answer to that is yes.]—Special grounds must be laid before the venue can be changed: *Aungier v. English* (b); and the rule is still more strict since the Common Law Procedure Act.—[PIGOT, C. B. That only applies after issue joined, and to a change upon the defendant's motion.]—It has been also decided that the plaintiff must pay the costs of the motion: *Hewitt v. Hewitt* (c).—[PIGOT, C. B. That was after issue joined.]—This consent presents the same state of facts as an amendment where there had been a special demurrer, with causes assigned. The meaning is, you may amend so as to make your summons and plaint good in those points in which it

(a) 11 Ir. Law Rep. 587.

(b) 7 Ir. Law Rep. 226.

(c) 3 Ir. Com. Law Rep. 222.

* Before the Full Court.

E. T. 1861. was defective. Suppose a new cause of action had arisen, could
Exchequer. a paragraph be added to the plaint so as to include it?—[Fitz-
COSTELLO GERALD, B. You say that a rule for liberty to amend in the
v. particulars specified in the grounds of demurrer, and a rule for
WOODS. liberty to amend "as he may be advised," are to have the same
construction. You might have objected to sign the consent except
in a qualified form.]

S. V. Pest, contra, was not called upon.

PIGOT, C. B.

This motion must be refused. The terms of the consent are
general, and they are binding upon us.

Motion refused with costs.

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ACCEPTANCE.

See CONTRACT FOR THE SALE OF
GOODS.

ACTION FOR PENALTIES.

In an action for penalties, under the Corrupt Practices Prevention Act 1854, the bribery imputed by the plaint was a promise of money for a vote, or to abstain from voting.—*Held*, that evidence of actual payment of money was admissible.

The evidence for the plaintiff, in support of the alleged bribery, rested solely upon the evidence of accomplices.—*Held*, that the jury were rightly directed that they might find for the plaintiff upon such testimony, though uncorroborated.

Held also (FITZGERALD, B., *dis-sentiente*), that in this action the Judge was not bound to tell the jury, by analogy to the practice in criminal cases, that the defendant was entitled to the benefit of a doubt in the evidence. *E. Magee v. Mark*
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ALLOWANCE FOR INCUMBRANCES.

See SUCCESSION DUTY.

AMENDMENT.

See PRACTICE, 6.

AMENDMENT OF POSTEA.

See PRACTICE, 6.

ARBITRATORS.

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ARREST OF JUDGMENT.

See PLEADING.

ASSISTANT-BARRISTER, JURISDICTION OF.

See LANDLORD AND TENANT.

ATTORNEY, WARRANT OF.

See AWARD.

AWARD.

An award directed that certain sums of money should be paid by one of the parties to the other, and that the former should secure the payment by his bond and warrant of attorney to enter judgment thereon; and, further, that the warrant should be lodged with the arbitrators, and that judgment should not be entered without their consent.—*Held*, that the latter provision, being of the body and substance of the award, and not beyond the power of the arbitrators, could not be rejected as surplusage.

Held also, that, inasmuch as it reserved a future power to the arbitrators, it rendered the award uncertain, inconclusive and void. *C. P. Lindsay v. Lindsay*
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AWARD, UNCERTAINTY OF.

See AWARD.

BAIL.

See TREASON.

BANK, PUBLIC OFFICER OF.

A summons and plaint, by one of the public officers of the Provincial Bank, who, "*as such public officer*," sued

A L

therein as nominal plaintiff on behalf of the said banking copartnership, complained that the defendant was "*indebted to the said copartnership*" for "*money lent by the plaintiff to the defendant,*" and for "*money paid by the plaintiff for the defendant, at his request;*" and the plaintiff prayed judgment "*as such public officer.*"—*Held*, bad on demurrer, for alleging the money to have been lent and paid by the plaintiff in his individual capacity, and not by or on behalf of the banking copartnership.

Reilly v. Whittaker (1 Ir. Law Rep. 28) distinguished, on the grounds stated by Brady, C.B., in *Thompson v. Kelly* (6 Ir. Law Rep. 38), as having been decided after verdict.

The 6 G. 4, c. 42, is to be strictly construed; and, in *civil* proceedings, the cause of action must, according to the fact, be averred to have accrued to the banking copartnership, although in *criminal* proceedings the property may be laid in, or the offence averred to have been committed against, any one of the public officers. *Q.B. Murray v. Comyn* 239

BILLS OF SALES ACTS.

See GROWING CROPS.

BRIBERY.

See ACTION FOR PENALTIES.

CARRIER.

See PLEADING.

CASE AFFIRMED.

Merrick v. Cummings (9 Ir. Com. Law Rep. 249) affirmed. *Ex. Ch. Cummings v. Merrick* 249

CASE REVERSED.

Beauman v. Kinsella (8 Ir. Com. Law Rep. 291) reversed, and a new trial awarded; on the grounds, first, that the plaintiff's orders to his water-bailiffs were inadmissible in evidence, without proof of acts done by the bailiffs in pursuance of those orders;

CONTRACT.

but, having been received in evidence, were materially calculated to influence the mind of the jury in finding a verdict for the plaintiff; and, secondly, that the evidence in the case was not sufficiently satisfactory to warrant the Court to order the verdict to be entered for the defendant. *Ex. Ch. Beauman v. Kinsella* 249

CAUSE OF ACTION, STATEMENT OF.

See BANK, PUBLIC OFFICER OF.

CERTIORARI.

See LUNATIC, COMMITTAL OF PERSON AS A DANGEROUS.

CIVIL-BILL EJECTMENT.

See LANDLORD AND TENANT.

CONSTRUCTION.

See DEED.

CONTRACT.

See SALE OF GOODS.

The plaintiff, a cattle dealer, shipped cattle on a steamer plying from Belfast to Fleetwood. The ticket delivered to the plaintiff by the ship-owner contained a clause giving liberty to tow and assist vessels. The steamer, on her voyage, having fallen in with a vessel in distress, towed her to Carrickfergus, and thence returned to Belfast, and, after some delay there, proceeded again to sea, and arrived at Fleetwood several hours after the usual time, in consequence of which the plaintiff was unable to send his cattle to the fair of B. The jury found that the steamer could not with safety have towed the vessel to Fleetwood, and that the only safe port to which she could have been brought was Belfast, of which Carrickfergus was a station; and they also found that the arrival of the steamer at Fleetwood was not at all delayed by her return to and delay at Belfast, owing to the state of the tide at the

CONTRIBUTORY, &c.

former port.—*Held*, that, under the special clause in the contract, the steamer was justified in returning with the vessel to the port of Belfast.

Held also, that the delay, which took place after leaving the vessel in port, before the steamer proceeded on her voyage, was not a ground of action, inasmuch as it did not further retard her arrival at Fleetwood. C. P. *Drain v. Henderson* 497

CONTRIBUTORY NEGLIGENCE.

In an action for injuries, resulting from alleged negligence—

Firstly; the plaintiff cannot recover unless the injuries were caused by the negligence of the defendants.

Secondly; nor can the plaintiff recover, notwithstanding there be negligence in the defendant, if he have so far contributed to the accident, by want of ordinary care, that but for that the accident would not have happened.

Thirdly; but though the plaintiff has so contributed to the accident, by want of ordinary care, he is not disentitled to recover, if the defendant might, by ordinary care, have avoided the consequence of the plaintiff's neglect.

Where there was antecedent negligence on the part of the defendants, operating up to the time of the accident, and then contributory negligence of the plaintiff, without which the accident would not have happened—*Held*, that the Judge was not bound to tell the jury that the defendants were not liable, unless they could, by a *new physical act*, irrespective of such antecedent and continuing negligence, have avoided the consequences of the plaintiff's neglect.

Observations on *Tuff v. Warman* (5 C. B., N. S., 573), and *Waite v. North Eastern Railway Company* (1 Ell., Bl. & Ell. 719). E. *Scott v. Dublin and Wicklow Railway Co.*

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DEFENCE.

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COSTS.

See PRACTICE, 1.

COVENANT.

See EJECTMENT.

CROWN, RIGHT OF, TO POST-PONE TRIAL.

See TREASON.

CUSTOM OF ALLOWING FIXED SUM FOR LANDLORD'S REPAIRS AND INSURANCE.

See MUNICIPAL CORPORATION ACT

DAMAGES, EVIDENCE IN MITIGATION OF.

See SLANDER, 1.

DEED.

A full and complete description of the subject-matter of a deed being followed by another description in the same instrument, the first description will be preferred, although the second is equally full and complete; and, therefore, where a deed of conveyance purported to convey "the town and lands of Dromardmore, situate in the barony of J. and county of T., containing 1085a. 0r. 23p., statute measure, or thereabouts, and described in the annexed map, with the appurtenances;" and where it was proved that the map annexed to the deed comprised a portion of the lands called Dromardbeg, and not Dromardmore—*Held*, that the first description in the deed, of the lands of Dromardmore, being sufficiently complete and certain, should prevail over the second description, comprised in the words "described in the annexed map;" and that nothing passed by the said deed which was not part of Dromardmore. Ex. Ch. *Roe v. Lidwell* 320

DEFENCE.

See PRACTICE, 3.
SLANDER, 2.

ESTOPPEL.

of the tenant's interest. The landlord, after getting into possession, cut and dug the respective crops.—*Held*, in action of trover, by the outgoing tenant against the landlord, that he was entitled to recover the value of the wheat, but not of the oats and potatoes.

Held also, that the rights of the tenant in respect of the crops were not affected by the proceedings in the ejectment. C. P. *Kelly v. Webber*

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ESTOPPEL.

See GUARDIAN.

EVIDENCE.

See EJECTMENT.

GUARDIAN.

JUDGMENT MORTGAGE.

PENALTIES, ACTION FOR.

PLEADING.

SEVERAL FISHERY.

WATERCOURSE.

EVIDENCE, ADMISSIBILITY OF.

To an action for wrongfully keeping and maintaining a weir at a height beyond its ordinary level, whereby plaintiff's lands were flooded, the defendant pleaded that he "did not wrongfully keep and maintain the weir at a height greater than its ordinary level." The issue followed the words of the defence.—*Held*, that the plea only put in issue the fact of the maintenance of the weir, and that evidence on behalf of the defendant that such maintenance was rightful was inadmissible. E. *Blood v. Keller*

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EVIDENCE IN MITIGATION OF DAMAGES.

See SLANDER, 1.

EVIDENCE OF RUMOURS.

See SLANDER, 1.

FALSA DEMONSTRATIO.

See DEED.

GUARDIAN.

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FALSE PLEA, SETTING ASIDE.

See PRACTICE, 3.

FELONY.

See TREASON.

FISHERY.

See SEVERAL FISHERY.

FORFEITURE OF RIGHT OF NURTURE.

See INFANT.

GUARDIAN.

The statute 14 & 15 Car. 2, c. 19, s. 6 (*Ir.*), which provides for the appointment of testamentary guardians, applies only to *legitimate* children; and, therefore, where a marriage ceremony had been celebrated by a Roman Catholic priest, between a man a Roman Catholic, and a woman who had, previously to the ceremony, conformed to and professed the Protestant religion (although it was alleged that she had stated before the marriage that she was a Roman Catholic), and the parties had lived together as man and wife, and were the father and mother of children, for whom the father had appointed guardians in his will :—*Held*, that the marriage being void (under the provisions of 19 G. 3, c. 13 (*Ir.*), the appointment of testamentary guardians was ineffectual.

Held also, that the evidence of the mother, as to the illegality of the marriage, in a proceeding in reference to the *status* of the children, was admissible; that she was not estopped from giving such evidence; and that the presumption arising from the facts of marriage, cohabitation, and reputation, was not sufficient in the present case to rebut such proof.

Quere—As to the effect of such a presumption in a proceeding between the reputed husband and wife, in reference to the validity of the marriage, *inter se*?

The mother is entitled to the guardianship of her illegitimate children.
C. P. *In re Darcys Infants* 298

GUARDIAN, RIGHT OF, FOR NURTURE.

See INFANT.

GROWING CROPS.

Growing crops are goods and chattels within the Bills of Sales Act (17 and 18 Vic., c. 55), being capable of complete transfer by delivery. Where growing crops were sold to a purchaser by written instrument, authorising him to enter upon the lands for the purpose of taking possession, and putting a party in charge of the crops:—*Held*, that as the purchaser had acquired no estate in the land, he had not such actual possession of the crops as dispensed with the necessity of registering the bill of sale. C. P. *Sheridan v. Macartney* 506

HABEAS CORPUS ACT.

See LUNATIC.

TREASON.

IMMORALITY OF PARENT, OR GUARDIAN FOR NURTURE.

See INFANT.

INCUMBRANCES, ALLOWANCE FOR.

See SUCCESSION DUTY.

INFANT.

In the absence of the appointment of a guardian by the father, the mother surviving him is the guardian for nurture, and entitled to the custody of a legitimate child, until it attain the age of fourteen years.

But the right of the parent or guardian for nurture to the custody of the child may be forfeited by prior immorality; by the want of *bona fides* in the application to the Court for a writ of *habeas corpus* to obtain the custody of the child; by its being

INTERPLEADER.

shown, to the satisfaction of the Court, that the parent or guardian has an illegal object or purpose in view in obtaining the custody of the child; or that such parent is unfit for discharging the duties of guardian, and that it would not be for the welfare of the child that it should be given into the custody of the parent or guardian—*per* LEFROY, C. J., and HAYES, J.; but, *per* PERRIN and O'BRIEN, JJ., in order to constitute, in a Court of Law, a forfeiture of the right of the parent or guardian for nurture to the custody of the child, the immorality of such parent or guardian for nurture must be of so gross a character that the morals of the child would be seriously endangered by being allowed to live with such parent or guardian for nurture; or that such parent or guardian for nurture has been guilty of cruelty and personal ill-usage towards the child.

Wilful and deliberate lying, showing an utter recklessness and disregard for truth, together with fraud practised on a charitable society, in order to obtain the benefits of the institution for the child, is such immorality as will cause a forfeiture of the right of a parent or guardian for nurture to the custody of the child—*per* LEFROY, C. J., and HAYES, J.—[PERRIN and O'BRIEN, JJ., *dissentientibus*].—Q. B. *In re Moore* 1

INSURANCE.

See MUNICIPAL CORPORATION ACT
SUCCESSION DUTY.

INTENDMENT, NECESSARY.

See SLANDER, 2.

INTERMEDIATE PROPRIETORS, RIGHTS OF.

See WATERCOURSE.

INTERPLEADER.

See GROWING CROPS.

JUDGMENT, &c.

JUDGMENT, ARREST OF.

See PLEADING.

JUDGMENT MORTGAGE.

A creditor, who has registered a judgment against lands, pursuant to the 13 & 14 Vic., c. 29, may maintain ejectment against his judgment debtor, without a previous demand of possession.

A statutable mortgage is an assignment by operation of law, within the meaning of the Sub-letting Act, 2 W. 4, c. 17, and is a good charge on lands held under a lease prohibiting alienation.—[FITZGERALD, B., *dubitante*].

The provisions of the 2 & 3 W. 4, c. 87, s. 32, requiring ten days' notice before trial to dispense with the production of the original memorial of a deed, do not apply to the office copy of the affidavit lodged in the Registry-office.

Quære, per PIGOT, C. B.—Whether examined copies of the judgment, the affidavit filed in Court, and the office copy lodged in the Registry-office, are not sufficient, or, at all events, *prima facie* proof?

The copy of the document lodged in the Registry-office bore at the foot of it the name "Francis Lacy." The plaintiff's attorney proved that he got the document lodged in the Registry-office from "Francis Lacy," the proper officer of the Law Court, and himself lodged it.

Per PIGOT, C. B.—This amounted to proof that the document lodged in the Registry-office was an "office copy."

Per FITZGERALD, B.—As only a copy of the document lodged in the Registry-office was produced, proof was necessary that the document lodged was, in fact, signed by the officer of the Law Court. E. *Reidy v. Pierce* 361

JUDGMENT NON OBSTANTE.

See PLEADING.

LANDLORD AND TENANT. 559

JURISDICTION OF ASSISTANT-BARRISTER.

See LANDLORD AND TENANT.

JURISDICTION, SERVICE OUT OF.

See PRACTICE, 5.

JURORS, PUTTING BY.

See TREASON.

JURY, QUESTION FOR.

See CONTRACT FOR THE SALE OF GOODS.

LANDLORD AND TENANT.

See EJECTMENT FOR NON-PAYMENT OF RENT.
EMBLEMENTS.

R., being tenant to P. of Blackacre, under a lease for lives, made an exchange, and received from P., in lieu thereof, a portion of Whiteacre; a memorandum in writing, but not under seal, having been signed by P., by which he agreed that R. should hold Whiteacre during the same term for which Blackacre was held under the lease. P. subsequently brought a civil-bill ejectment for Whiteacre, and obtained a decree; and having taken possession under it, R. brought an action against him for taking possession of the lands; and the sole question for trial was, whether the Assistant-Barrister, upon whose decree P. relied, had jurisdiction to hear and determine the case, it being proved at the trial of the action, that the last *cestui que vie* in the lease, who was proved, at the trial of the civil-bill, to have been absent in America for thirty years (and whose death was, therefore, presumed, under the 7 W. 3, c. 8), was actually still alive.—*Held*, that inasmuch as Whiteacre was held under a mere parol agreement, the estate of R. therein could be no more than a tenancy from year to year, and that there was, therefore, nothing to show that the

proceedings before the Assistant-Barrister were *coram non Judice*.

Quere.—Whether if Whiteacre had been held under the lease, the subsequent production of the *cestui que vie* would oust the Assistant-Barrister's jurisdiction, under the 72nd section of 14 & 15 Vic., c. 57. C. P. *Rowland v. Perse* 49

LANDLORD'S REPAIRS AND INSURANCE, CUSTOM OF ALLOWING FIXED SUM FOR.

See MUNICIPAL CORPORATION ACT.

LUNATIC, COMMITTAL OF PERSON AS A DANGEROUS.

An order of Justices, committing a person to gaol as a dangerous lunatic, under the 1 & 2 Vic., c. 27, and the 8 & 9 Vic., c. 107, is not valid, unless there appear, upon the face of the information upon which the order is founded, facts showing, first, that the person was discovered and apprehended under circumstances denoting a derangement of mind; secondly, that he had a purpose of committing an indictable offence; and, thirdly, that such person was a dangerous lunatic. It is not enough that there should appear, on the face of the information, matters from which, by possibility, the case might be one coming within those Acts of Parliament; the grounds must be shown, establishing the several requirements of those statutes as facts. An order of committal, therefore, of a person as a dangerous lunatic, founded upon informations which stated that such person was found trespassing in a certain demesne, of which he asserted he was the lawful possessor, and refused to leave, and violently assaulted those removing him, and threatened the owner of the demesne, is invalid. When a person is in custody under an order of Justices sitting in Petty Sessions, the proper course of proceeding is, not to apply to the Superior Court for a *certiorari* to remove the order

of Sessions for the purpose of quashing it, but to apply for a writ of *habeas corpus*, upon the return to which the several documents in the case will, *necessarily*, be before the Court.

A *certiorari* will not be granted, where a person is in custody in a Lunatic Asylum under the warrant of the Lord Lieutenant; he being entitled, under the 8 & 9 Vic., c. 107, to be discharged, upon its being certified to the Lord Lieutenant, as required by that Act, that such person has become of sound mind, or has ceased to be, or is not, a dangerous lunatic.

The application for a *certiorari* must be made by the person complaining of the order sought to be brought up for the purpose of being quashed, and cannot be made by another person in his behalf.

Where a person committed as a dangerous lunatic allowed two Assizes and two Quarter Sessions to pass, after his committal, without making any application to those tribunals for his discharge, and a period of between nine and ten months to elapse between his committal and his application to the Court of Queen's Bench, this is such laches and delay, on the part of the applicant, as precludes him from obtaining a *certiorari*.

Semble.—That although delay in applying for a *certiorari* will not, *per se*, be a ground for refusing to grant the application, yet there may be circumstances under which it becomes an important matter to be taken into consideration.

Where Magistrates, by defectively and carelessly discharging duties cast upon them by Act of Parliament, lay the foundation for an application to the Superior Court, they will not be allowed the costs of such proceedings.

A motion for the writ of *habeas corpus* ordered to stand over, until the person in custody (alleged to be a

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A motion for the writ of *habeas corpus* ordered to stand over, until the person in custody (alleged to be a

MAP.

dangerous lunatic) had been examined by medical men, approved of on behalf of such person and the Crown, to ascertain whether he was *then* a dangerous lunatic, or only labouring under a harmless delusion. Q. B. *The Queen v. Riall* 279

MAP.

See DEED.

MARRIAGE.

See GUARDIAN.

MARRIAGE, VALIDITY OF.

Since the Reformation, a marriage in this country can be legally contracted only in the presence and with the assent of a clerk in Holy Orders, who must be a third person, and not one of the contracting parties to said marriage. It is, therefore, not competent for a clergyman to marry himself, and such marriage is absolutely null and void. H. of Lds. *Beamish v. Beamish* 511

MUNICIPAL CORPORATION ACT (IRELAND).

A person claiming to be enrolled as a burgess cannot add, to the net annual value at which the premises occupied by him are rated, a sum for landlord's repairs and insurance, so as to make up the amount of qualification required by the 3 & 4 *Vic.*, c. 108, s. 30, unless such sum be stated in the rate; and, therefore, a custom in a borough of allowing a fixed sum for landlord's repairs and insurance, the same not being stated in the rate, is bad. Q. B. *Phibbs, appt., v. Kearns, resp.* 294

NEGLIGENCE.

See CONTRIBUTORY NEGLIGENCE.

NON-ALIENATION CLAUSE.

See JUDGMENT MORTGAGE.

NON-PAYMENT OF RENT.

See EJECTMENT FOR NON-PAYMENT OF RENT.

PAROL LICENSE. 561

NURTURE.

See INFANT.

OBSTRUCTION OF PASSAGE OF WATER FROM PUBLIC ROAD.

The closing up of a flat open or gap in a ditch, through which the occupier of land contiguous to a public road was in the habit of drawing manure for, and of passing into, his said land, and which was the only way whereby water flooding the public road could flow off, is not an obstruction within section 9, par. 1, of the 14 & 15 *Vic.*, c. 92; and, therefore, an order of Magistrates in Petty Sessions, requiring the occupier of the land to remove such obstruction to the passage of the water, is not authorised by that section, and cannot be sustained. Q. B. *Scannell v. French* 275

OVERHOLDING.

See EMBLEMENTS.

PARENT, RIGHT OF, FOR NURTURE.

See INFANT.

PAROL LICENSE, WHERE REVOCABLE.

A parol license to do an act on the lands of the licensee, which but for the license would be wrongful, and may be injurious to the licensor, is not revocable after expense incurred on the faith of it, at all events without putting the licensee in *statu quo*.

Nor, *semble*, will it make any difference that such an act is to be done partly on the lands of the licensor, and partly on those of the licensee. Where a plaintiff stated a cause of action for consequential damage arising from an act done on land other than the plaintiff's, and, in a replication, the act was alleged to have been done partly on the lands of the plaintiff:—*Held*, that this was a departure which was the subject of general demurrer. E. *Blood v. Keller* 124

PENALTIES, ACTION FOR.

In an action for penalties, under the Corrupt Practices Prevention Act 1854, the bribery imputed by the plaint was a promise of money for a vote, or to abstain from voting.—*Held*, that evidence of actual payment of money was admissible.

The evidence for the plaintiff, in support of the alleged bribery, rested solely upon the evidence of accomplices.—*Held*, that the jury were rightly directed that they might find for the plaintiff upon such testimony, though uncorroborated.

Held also (FITZGERALD, B., *dissentiente*), that in this action the Judge was not bound to tell the jury, by analogy to the practice in criminal cases, that the defendant was entitled to the benefit of a doubt in the evidence. *E. Magee v. Mark* 449

“PLACE OF EXPORT,” MEANING OF TERM, WITHIN THE BUTTER ACTS.

See PUBLIC OFFICE, EVIDENCE OF TITLE TO.

PLAINT, DEMURRER TO.

See BANK, PUBLIC OFFICER OF.

PLEADING.

See EVIDENCE, ADMISSIBILITY OF. PAROL LICENSE, WHERE REVOCABLE.

D. K. sued the B. and B. Railway Company, the L. and C. Railway Company and W. M'C., jointly, as common carriers, for the loss of a certain travelling-case containing watches, whilst being carried by them from B. to L. upon a through ticket. The defendants, amongst sundry other defences, pleaded that D. K. was only entitled to carry personal luggage, and that the case in question did not answer that description, but that it and its contents constituted merchandize. The plaintiff replied that the case was in appearance fit for, and

manifestly did contain, merchandize, to wit, watches, and not personal luggage, and that defendants received it without objection, and without demanding extra remuneration, and without making inquiry of the plaintiff touching the value of the contents of the case, and that there was no improper concealment on his part. The defendants rejoined, traversing the averments in the replication, and the jury found that the said case was in appearance and fact fit and proper for, and manifestly did contain, merchandize, but that the particular sort of merchandize which it so contained did not manifestly appear, but that in point of fact it did then contain watches. They also found that there was no improper concealment on the part of the plaintiff, touching said case. They also found that the defendants were not guilty of gross negligence. Upon a motion to enter up judgment for the defendants, *non obstante veredicto*, on the ground that the replication was no valid answer to the foregoing special defence, the Court below having given judgment in favour of the plaintiff, the defendants suggested error.

Held (by three Judges against three), affirming the judgment of the Court of Common Pleas, that the above replication disclosed a valid answer to said defence.

Held also (by three Judges against three), that the finding of the jury thereon was substantially a finding in favour of the plaintiff.

Held also, that the judgment against the said defendants (plaintiffs in Error) ought not to be arrested in consequence of the acquittal of a co-defendant, notwithstanding that the duty, the breach of which was complained of, grew out of an implied contract. *Ex. Ch. Belfast and Ballymena Railway Company v. Keys* 145

POSSESSION, DEMAND OF.

See JUDGMENT MORTGAGE.

POSTEA.

POSTEA, AMENDMENT OF.

See PRACTICE, 6.

PRACTICE.

1. Where the plaintiff obtains leave to change his own venue, the defendant will be entitled to costs of the motion. *C. P. Comerford v. Daly* 62
2. In an action for work and labour, by an agent against his employers, it appeared that the action was brought for agency commission, and that the contract was made in England, and the services rendered in Ireland.—*Held*, that the performance of the work in Ireland was such a material part of the cause of action as enabled the Court to substitute service.

The defendants, who were coffee-merchants, issued advertisements in which they announced that J. L. was their agent for Belfast. It appeared that J. L. was in communication with them.—*Held*, that J. L. was the agent of the defendants, within the meaning of the 34th section of the Common Law Procedure Act 1853. *E. Reilly v. White* 138
3. Where a defence is warranted by the Common Law Procedure Act, and raises a single issue, the Court will not try its truth or falsehood upon affidavit. *E. O'Donnell v. Reilly* 329
4. Where any one of several defendants named in a writ of summons and plaint has not been served, and there are other defendants, upon whom service might have been, but was not, effected, the renewal of the writ, on the ground of the non-service of such one defendant, will prevent the operation of the Statute of Limitations in favour of such other defendants. *E. Dickson v. Capes* 384
5. The Court has no power to authorise service of a defendant out of the jurisdiction, unless by substitution in the manner specified in the 34th section of the Common Law Procedure Act 1853. *E. Dickson v. Capes* 345

PUBLIC OFFICE, &c. 563

6. The amendment of an error in a postea which has been filed is to be made by the Court on motion, grounded on the certificate of the Judge who tried the case. *E. Powell v. Atlantic Steam Navigation Company* 347

PRESCRIPTION.

See SEVERAL FISHERY.

PRESENCE OF CLERK IN HOLY ORDERS.

See MARRIAGE, VALIDITY OF.

PRESUMPTION.

See EJECTMENT.
GUARDIAN.

PRIVILEGE.

See SLANDER, 1, 2.

PROCEDURE ACT.

See EVIDENCE, ADMISSIBILITY OF.
PRACTICE, 4.

PUBLIC OFFICE, EVIDENCE OF TITLE TO.

Evidence of acting in a public office is evidence to go to the jury of a title to that office, as against a wrong-doer, though the title be put in issue by the pleadings, and the appointment is required to be under seal.

Such evidence of acting raises a presumption that all the formalities necessary to be completed to authorise such acting have been complied with.

A statement of the plaintiff, that he was appointed in 1859, and the fact of a subsequent exercise of the office, *Held*, evidence to go to the jury of a title to such an office, though the plaintiff's title was traversed, and he admitted that he had acted without title for seven years previously to 1859.

An inland town, from the market of which butter is conveyed direct for

the foreign market, is not a "place of export from whence butter is commonly shipped for exportation," within the meaning of the 52 G. 3, c. 134, and 7 & 8 G. 4, c. 61. E. *Dexter v. Hayes* 106

REFUSAL OF MAGISTRATES TO STATE CASE FOR THE OPINION OF THE SESSIONS COURT, UNDER THE EXCISE ACTS.

Where a publican applies to Magistrates, sitting at Petty Sessions, for a renewal of his license, under the 17 and 18 Vic., c. 89, and 18 & 19 Vic., c. 62, which application is refused, upon the ground that the applicant's house had not been properly conducted during the previous year, this is not a case in which the Superior Court will direct the Magistrates to state a case under the 20 & 21 Vic., c. 43, s. 5; it being neither "*an information or complaint*," within the meaning of that statute, but a matter of fact to be ascertained by the Justices; the applicant's course, if aggrieved, is to appeal from the decision of the Magistrates to the Quarter Sessions, or (if in Dublin) to the Recorder.

Per HAYES, J.—The term "information" means the initiatory step in proceedings of a criminal nature, which are to be disposed of summarily; the term "complaint" designates the initiatory step in summary proceedings of a civil nature. Q. B. *In re Dillon* 232

REGISTRATION OF BILLS OF SALE.

See GROWING CROPS.

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See MUNICIPAL CORPORATION ACT.

RIGHT OF CROWN.

See TREASON.

SEVERAL FISHERY.

RUMOURS, EVIDENCE OF.

See SLANDER, 1.

SALE OF GOODS, CONTRACT FOR.

The plaintiff alleged an absolute sale, by sample, of a quantity of guano to the defendant.

The defendant alleged it to have been a contract for sale and return.

The guano (a larger quantity than ordered) was consigned to the defendant, and, on the day after its arrival, the defendant sent a portion of it to a chemist to be analysed, who made an unsatisfactory report. There was evidence of repudiation by the defendant, and also some evidence of acceptance.

While the guano was being analysed, the defendant sold one bag of the guano, and subsequently sold a second.—*Held*, that the question whether the defendant's acts amounted to an acceptance of the goods was a question for the jury, and was properly left to them.

Held also, that the plaintiff was entitled to a verdict for the value of the two bags sold. E. *Clark v. Wright* 402

SERVICE OUT OF JURISDICTION.

See PRACTICE, 5.

SERVICE, SUBSTITUTION OF.

See PRACTICE, 2.

SEVERAL FISHERY.

A several fishery in the river M., having become re-vested in the Crown, was in 1669 re-granted in fee-simple to Sir G. P., whose representatives afterwards, in 1788, demised the same to a party through whom the plaintiffs claimed. The defendants, at the trial of an action for the disturbance of the plaintiffs in the exclusive enjoyment of said right, having given some evidence of adverse user by them

SEWAGE OF A TOWN.

of a fishery within a portion of that claimed by the plaintiffs, at a certain spot in the M., opposite to the lands of S., for upwards of sixty years:—*Held* (RICHARDS, B., *dissentiente*), affirming the judgment of the Court of Common Pleas, that the jury were at liberty to presume a sub-grant by the owners of the original fishery to parties under whom the principal defendant derived. Ex. Ch. *Little v. Wingfield* 63

SEWAGE OF A TOWN.

See WATERCOURSE.

SHIP.

See CONTRACT.

SLANDER.

1. *Semble*, where a slander imputes the commission, by the plaintiff, of a particular offence, evidence of an antecedent general reputation of the plaintiff's general bad character, or of his having some vicious habit, leading to the particular act, is admissible.

But *Held* (PRIGOT, C. B., *dissentiente*), that this rule does not let in evidence of a general reputation that the plaintiff was guilty of the particular offence charged by the slander.

Evidence of rumours shown to have been originally originated by the defendant is not admissible.

Where the slanderous words were spoken by the defendant in a conversation with A, in the presence of third persons, and there was no plea of privilege on the record—*Held* (PRIGOT, C. B., *dissentiente*), that evidence that it was the duty of the defendant to make the communication to A was not admissible in mitigation of damages. E. *Bell v. Parke* 413

2. The defendant, who was the secretary of a charitable institution for the reformation of fallen females, called "Dublin by Lamplight," where the

SLANDER.

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clothes and linen of families and individuals were washed by the inmates of the institution, was sued by the plaintiff, who had been the paid matron of the house, at the time in question, for having spoken, in the presence and hearing of several of the inmates of the institution, as well as of divers other persons, addressing the plaintiff, and holding certain handkerchiefs in his hand, "Who authorised you to forge your name on the handkerchiefs of Mrs. —?" (one of the parties for whom the institution did washing); also the words, "Women, look at it! it is the proof of your matron's guilt." The defendant pleaded a defence stating the objects of the institution, and the nature of his duties therein; and the fact of certain property having been purloined, and found under circumstances calculated to awaken suspicion; and he then alleged that, in the discharge of his general duty, as secretary, and by direction of the committee, he inquired into the matter, in the presence of the plaintiff and certain of the inmates, who were interested in the subject-matter of the inquiry, and who themselves had made charges against the plaintiff; and that on that occasion, and in the discharge of his duty, &c., and acting *bona fide* within the scope of his authority, and without malice, he spoke the words, believing them to be true.—*Held*, on demurrer to the defence, first, that the facts therein stated showed that the occasion of speaking the words was privileged.

Secondly; that the defendant did not forfeit his privilege, in consequence of his mode of conducting the investigation.

Thirdly; that the presence, on the occasion in question, of other persons besides those interested in the inquiry, did not affect the question of privilege.

Fourthly; that, though not expressly averred in the defence, that the occasion of speaking the words

566 STATUTE OF LIMITATIONS.

therein referred to was the same as that stated in the summons and plaint, it appeared to be so by necessary intendment. *C. P. Wallace v. Carroll* 485

STATUTE OF LIMITATIONS.

See PRACTICE, 4.

STATUTES QUOTED.

- 1 *G. 4, c. 42.*
- 3 & 2 *Vic., c. 27.*
- 6 & 4 *Vic., c. 108, s. 30.*
- 8 & 9 *Vic., c. 107.*
- 11 & 12 *Vic., c. 12.*
- 14 & 15 *Vic., c. 92.*
- 17 & 18 *Vic., c. 55, s. 102.*
- 20 & 21 *Vic., c. 43.*

SUBSTITUTION OF SERVICE.

See PRACTICE, 2, 5.

SUCCESSION DUTY.

A testator devised certain estates to A for life, with remainder to his first and other sons in tail male. In the year 1827, A and the defendant, his eldest son, joined in barring the entail of the devised lands; and by the deed leading the uses of the recovery, dated the 17th of January 1827, the lands, including some lands the absolute property of A, were limited to A for life, remainder to the defendant for life, remainder to his first and other sons in tail. Power was given to the defendant, with A's consent, to charge the lands with pin-money, a jointure and portions; and a joint power of revocation and new appointment was given to A and the defendant.

On the 1st of December 1829, the defendant, by his marriage settlement, exercised, with A's consent, the power in the deed of 1827; and, by subsequent deeds, A and the defendant, in pursuance of their joint power of revocation and new appointment, created further charges on the lands; and by a deed, dated the 15th of July 1854, executed on the marriage

TREASON.

of B, the eldest son of the defendant, they revoked all the previous uses, and, subject to the incumbrances already created, and to an annuity then granted to B, they conveyed the estates, and certain leaseholds, the property of A, to the use of A for life, remainder to the defendant for life, remainder to B for life, remainder to his first and other sons in tail. Pin-money for B's wife, and portions for his children, were also charged on the lands.

On the 19th of November 1854, A died, and the defendant (the successor) claimed to be entitled, as against the duty payable on his succession, to an allowance, under section 34 of the Succession Duties Act 1853, for the incumbrances charged by himself and A, under the provisions of the indenture of the 17th of January 1827, and the subsequent deeds.—*Held*, that the defendant was not entitled to such allowance; that these incumbrances were "created or incurred by the successor," within the meaning of the 34th section of the Succession Duty Act 1853; and further, that they were "not made in execution of a prior special power of appointment" within that section.

Held also, that the defendant was not entitled to any allowance for income-tax, insurances against fire, or agent's fees.

The jurisdiction of this Court, as a Court of Revenue, to entertain an information at its Equity side, is not taken away by the 13 & 14 *Vic. c. 51. E. Attorney-General v. Lorton* 429

SUCCESSION DUTY ACT.

See SUCCESSION DUTY.

TREASON.

Prisoners arrested in December were committed to gaol in the January following, on a charge of treason-felony, under the 11 & 12 *Vic., c. 12.* At the Spring Assizes, in the

following March, indictments for treason-felony having been preferred and found against the prisoners, they were arraigned, pleaded not guilty, and were ready to proceed with their trial; whereupon the Attorney-General, on the part of the Crown, applied to the Judge of Assize to postpone the trial to the next Assizes. This application, which was not grounded on affidavit disclosing any cause for the postponement, was granted, without discussion, by the Judge, who ordered that the prisoners should in the meantime be kept in custody. Upon motion in the next Term, to admit the prisoners to bail, *Held*—

Per LEFROY, C. J., and HAYES, J., that the Court, in the exercise of its discretion, ought not to grant the motion.

That a prosecutor, in cases of felony, has, by the Habeas Corpus Act, one Term or Session, after the commitment of the prisoner, and his prayer under that Act, to prefer an indictment against the prisoner, and another Term or Session to bring on the trial; that if the prisoner is not indicted in the first Term or Session after committal, he is entitled to be bailed; and, if he is not indicted in the first, and tried in the second Term or Session after committal, he is entitled to an absolute discharge.

Sed, per PERRIN and O'BRIEN, JJ., that the Court, in the exercise of its discretion, ought to grant the motion, the trial of the prisoners having been postponed on the application of the Attorney-General, on the part of the Crown, without any ground being shown for such postponement.

The Court of Queen's Bench has full discretionary power to admit to bail, in all cases, no matter how serious the offence charged may be.

Where an indictment for felony has been found against a prisoner at one Assizes, there is no prerogative or absolute right in the Crown to

postpone the trial; such postponement is the act of the Court, in the exercise of its discretion. There is no difference between the law in England and Ireland in this respect; and, *per* LEFROY, C. J., and HAYES, J., an application to the Court for that purpose is not necessarily grounded on affidavit; *sed, per* PERRIN and O'BRIEN, JJ., such grounds ought to appear by affidavit, or otherwise upon oath.

The question, in bail motions, is the likelihood of the prisoner being forthcoming to take his trial, if admitted to bail; and the elements to be considered in the determination of that question are, first, the nature of the offence charged; second, the character of the evidence against the prisoner; and, third, the punishment which, in the event of conviction, may be inflicted on the prisoner.

The right of ordering jurors to stand by, in cases of misdemeanour, may be exercised by a private prosecutor equally with the Crown: *Regina v. M'Gowen* (Ct. Crim. Ap., E. T. 1858). Q. B. *The Queen v. M'Cartie* 188

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See TREASON.

VENUE.

See PRACTICE, 1.

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See PLEADING.

WARRANT OF ATTORNEY.

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WATERCOURSE.

For upwards of fifty years the rain-fall and drainage of the main street of a town, situate on the slope of a hill, had, for the convenience of the inhabitants, run down through a kennel on each side of the street into a culvert, which connected the kennels at

the end of the street, and discharged its contents into an open lane, through which they flowed into the plaintiff's drain, and were used by him for agricultural purposes, the surplus flowing off into the Shannon. There was no definite channel for the stream of water and the sewage to flow in through the lane, which was the passage to the fair-green of the town, and was the property of the defendant; but the lane being lower at one side than the other, the stream flowed along the lower side, spreading more or less over the surface of the lane, and sometimes in floods covering the entire surface. The defendant having stopped the passage by which the stream at the end of the lane flowed into the plaintiff's drain, and diverted the water into a drain upon his own land:—*Held*, that there was evidence of a watercourse, viz., water flowing between banks more or less defined.

That, as long as the inhabitants of the town permitted the water and sewage to continue so to flow, the plaintiff had, as against the defendant, acquired a right, by presumption of grant, to have it continue to flow into his drain; and that the defendant had, as against the plaintiff, acquired, in like manner, a correlative right to have the flow continue, without such obstruction by the plaintiff as would flood or injure the defendant's lands.—[FITZGERALD, B., *dissentiente*.]

WRITS, RENEWAL OF.

Semble.—That the inhabitants of the town had, as against both the plaintiff and defendant, and all intervening proprietors, acquired an easement of having their drainage transmitted through the lane into the Shannon; but, that neither the plaintiff, nor defendant, nor any other intermediate proprietor, could, as against the inhabitants of the town, insist on the continuance of the flow of water and sewage, if the inhabitants, or any of them, chose to stop or divert its flow, or alter the system of drainage.

When the question at the trial is, whether there is a watercourse or not, the Judge ought, before he leaves that question to the jury, to instruct them as to what constitutes a watercourse in law.

To constitute a watercourse, in which rights may be acquired by user, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbour's land. Water which squanders itself over an indefinite surface is not a proper subject-matter for the acquisition of a right by user. Q. B. and Ex. Ch. *Briscoe v. Drought* 250

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EMBARRASSING DEFENCE.

A defence to an action for a money demand, controverting the plaintiff's right to recover part of the demand, and, as to the residue, admitting the plaintiff's claim in respect thereof, and confessing the action to that extent, concluding with "and therefore he defends the action," will be set aside. *C. P. Defries v. Stewart*

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NOTICE OF TRIAL.

Where a notice of trial was served upon the 25th of May, for the trial of the cause before the Judge presiding in the Consolidated Nisi Prius Court during Term, on Thursday the 7th day of May 1860—*Held*, that, inasmuch as the defendant must have known that the 7th of June was the day *actually* intended, the notice being correct in every other respect, it was sufficient, and a motion to set it aside was refused with costs. C. P. *Graham v. Brennan* xvii

PLEA SET ASIDE AS EMBARRASSING.

See PRACTICE, 1.

PLEADING.

1. A summons and plaint which alleged that F., on behalf of himself and the plaintiff, at the request of the defendant, bargained with the defendant to buy of him 100 tons of hay at £4 a-ton, to be delivered by said defendant to said plaintiff and F., when sent for by them, and to be paid for by said plaintiff and F. on delivery thereof, and in consideration thereof said defendant undertook to deliver said 100 tons of hay when requested. *Averment*—That plaintiff and F. in his lifetime were willing to accept said 100 tons of hay, and afterwards frequently requested said defendant to deliver to them said 100 tons of hay, and were always willing to pay for such hay on delivery. *Breach*—That defendant did not deliver said 100 tons of hay, or any part thereof, though plaintiff and F. in his lifetime have been willing and offered to accept said 100 tons of hay.—*Held*, to be embarrassing; leave given to the plaintiff to amend. Q. B. *Warren v. King* x
2. In an action on a promissory note

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for £45. 2s. 9d., the plaintiff claimed the sum of £13. 2s. 9d., but did not aver "that the defendant never paid the note." On motion made to set aside the plaint as embarrassing—*Held*, good. Q. B. *Cruise v. Connell* xxi

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The summons and plaint stated that one P., having applied to plaintiff for the loan of £100, proposed to assign to him a deed of assignment of certain premises, together with the original title-deeds, to be held as an equitable mortgage for securing the repayment of said sum of £100; to which plaintiff acceded, on condition that said deed of assignment should be duly registered.—Averment; that defendant undertook to act as plaintiff's attorney in carrying into effect said agreement, and to have said deed duly registered, and by writing undertook, when same should be duly registered, to hand same with the original deeds to plaintiff; that plaintiff lent the £100, but that defendant neglected to register said deed of assignment, or to hand said original deeds to plaintiff; by reason of which neglect said P. assigned said deed of assignment to one K., whereby plaintiff lost the security on which he lent said £100, which said sum had been thereby totally lost to plaintiff. The plaintiff pleaded, *inter alia*, "that the assignment of said P. to said K. was caused by the acts, and done with the assent, of plaintiff himself." This defence set aside as embarrassing, as being neither a traverse, nor a plea in confession and avoidance of the entire cause of action. Q. B. *O'Hanlon v. Murray* vii

2. In replevin for an illegal seizure of plaintiff's goods and chattels, leave given, upon payment of costs, to amend the summons and plaint, by introducing therein a prayer for the

recovery of the goods and chattels in the summons and plaint mentioned.

Q. B. *Hudson v. Rogers* ix

3. A writ of *fi. fa.* was directed to the Sheriff of D. The following direction was indorsed upon the writ:—"Defendant's goods is at 3 Castle-Forbes, city of Dublin, which I require to seize;" signed by the plaintiff's attorney. The Sheriff having represented that there was no such place, the words "East Sheriff-street" were afterwards interlined. The Sheriff, having ascertained that the direction, so amended, did not denote the defendant's residence, and having heard that she resided elsewhere, made inquiry, and was informed that the furniture in the latter place did not belong to her. He then applied to the plaintiff's attorney for further directions, which were refused, and he was peremptorily required to execute and return the writ. The return of the writ having expired, a rule to return same was entered against the Sheriff.—*Held*, on motion to set aside the above rule, that inasmuch as the plaintiff's attorney had voluntarily undertaken to point out the defendant's goods to the Sheriff, and had given him information calculated to mislead, the Court would not subject the Sheriff to the risk of an action for a false return, by requiring him to return the writ, and they accordingly set aside the rule. C. P. *Blackburne v. Stratton* xii
4. Leave granted to enter judgment on a bond and warrant of attorney executed more than ten years prior to the application. Q. B. *Graham v. Angelo* xx
5. When bail will not attend in the county in which a prisoner is confined, but will attend in Dublin, the Court will grant a writ of *habeas corpus* to bring up the prisoner, in order that the bail may be sworn in her presence. Q. B. *The Queen v. Hussey* xx
6. Upon motion and affidavit of the

plaintiff, stating that, unless the Court granted the writ of injunction prayed for in the plaint, he would sustain considerable loss before the action could be tried, the Court granted the writ, upon the terms that the plaintiff would speed the action, and, if the jury found for the defendant, would, if the Court so ordered, pay to the defendant any sum which the jury should award to him as compensation for the damages sustained by reason of the interference of the Court in granting the writ. Q. B. *Longfield v. Cashman* xxiii

7. A defendant, sued under the Municipal Corporation Act (Ireland), for penalties for alleged acts of bribery, moved the Court to compel the plaintiff to give security for the costs, and grounded his motion upon uncontradicted allegations that the plaintiff was a pauper—a clerk to his own attorney, wholly unconnected with the borough in which he alleged the acts to have been committed, and had no personal knowledge of them. The defendant denied explicitly that he was guilty of the acts alleged.—*Held*, that, in *qui tam* actions, the Court has jurisdiction, if the proceedings are collusive, to compel the plaintiff to give security for costs. Q. B. *Browne v. Redmond* xxvi
8. Where a defendant demurred to a summons and plaint, and a consent was entered into that the plaintiff might be at liberty to "amend as he might be advised"—*Held*, that the plaintiff might change the venue as originally laid. E. *Costello v. Woods* xxxi

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SHERIFF.

The right of the Sheriff to poundage fees is created by statute, but did not exist at the Common Law.

The Sheriff is entitled, in every case of an execution under a writ of *fi. fa.*, to deduct his poundage fees out of the sum levied, even though there be no surplus beyond the amount of the execution.

In the case of an execution under a *fi. fa.*, where there is a surplus beyond the amount of the execution, if, with the assent of the defendant in the execution, expenses are incurred by the Sheriff, either for the preservation or for the more advantageous sale of the goods, he is entitled, not only to his poundage fees, but also to such expenses.

The Sheriff is not entitled, upon an application by him for an interpleader order under the Interpleader Act, to the costs of such application; but if there be conflicting claims with respect to the property seized, and the contending parties, by persevering in their claims, render it necessary for the Court to interfere, and grant the Sheriff a summoning order under that Act, the jurisdiction of the Court, thereupon, attaches, and the costs of keeping and preserving the goods seized, incurred after, but not before,

the making of the summoning order, are within the direction of the Court; the Sheriff, however, in applying for such costs, must satisfy the Court that, after seizure and notice of claim, he has proceeded, under the Interpleader Act, with due promptness.
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